

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940

No. ~~343~~ 407

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STELLA P. FLINT, AS GENERAL GUARDIAN OF THE  
PROPERTY OF SAMUEL N. STONE, JUNIOR, A MINOR,  
APPELLANT,

vs.  
STONE TRACY COMPANY ET AL.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF VERMONT.

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FILED JANUARY 21, 1941.

(21,973.)



(21,973.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT, AS GENERAL GUARDIAN OF THE  
PROPERTY OF SAMUEL N. STONE, JUNIOR, A MINOR,  
APPELLANT,

vs.

STONE TRACY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
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1 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel  
N. Stone, Junior, a Minor, Complainant,

versus

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON  
B. HAYWARD, Defendants.

*Bill of Complaint.*

To the judges of the Circuit Court of the United States for the  
District of Vermont sitting in equity :

Stella P. Flint, a citizen of the State of Vermont and a resident  
of Windsor in said State, as General Guardian of the property of  
Samuel N. Stone, a minor, brings this her bill of complaint in be-  
half of herself, as such General Guardian, and all other stockholders  
who are similarly situated and who shall be entitled to avail them-  
selves of the benefit of this suit against the Stone Tracy Company, a  
corporation created and chartered by the State of Vermont and ex-  
isting under and by virtue of a charter and franchise granted by the  
State of Vermont under and by virtue of the laws of said state,  
located and having its principal office for the transaction of business  
in the village and town of Windsor in the district and state of  
Vermont, and thereupon your orator complains and says as follows:

2 *First.* Your orator shows that the defendant, the said Stone Tracy  
Company, is a corporation duly chartered and created by the  
State of Vermont and existing under and enjoying a charter  
and franchise granted by the state of Vermont and under  
and by virtue of the laws of said State; that the said corporation  
was incorporated on the first day of September, 1900, and that the  
capital stock of the said corporation consists and always has con-  
sisted of the sum of twenty thousand dollars (\$20,000) divided into  
and represented by two hundred shares of the par value of one hun-  
dred dollars (\$100) each.

*Second.* Your orator further shows that in and by the charter  
and franchise aforesaid, the defendant corporation was authorized  
to engage in and has, ever since the date of its incorporation, been  
engaged in the carrying on of a general retail mercantile business  
in the village and town aforesaid.

*Third.* Your orator further shows that in and by the laws of the  
state of Vermont it is among other things provided that the prop-  
erty, affairs and concerns of the defendant corporation shall be man-  
aged and conducted by the directors of the corporation, and, as your  
orator is informed and verily believes, the above-named defendants,  
Frank B. Tracy, Ida S. Tracy and Leon B. Hayward are citizens of  
the state of Vermont and residents and inhabitants of the district of  
Vermont and are the directors of the defendant corporation, duly  
elected as such and now acting in that capacity and managing and

conducting all and singular the property, affairs and concerns of the said defendant corporation.

*Fourth.* Your orator further shows that in the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership firm, of which they became the only part-

ners, for the transaction of a general retail mercantile business in the village of Windsor, Vermont, and continuously

carried on the same in said village under the firm name of Tuxbury and Stone for upwards of twenty-nine years at the same stand on the corner of the main street and a lane which leads to the railroad station. The business of the said firm of Tuxbury and Stone became very large in proportion to the population of the said village and was successful and profitable and increased in volume and became the principal general merchandise shop or store in an area of some ten square miles. The firm of Tuxbury and Stone from time to time took in other partners, but no essential change took place in the management until the year 1895 when the firm dissolved and two new firms were formed therefrom, one consisting of Dwight, Charles and William D. Tuxbury under the firm of Dwight Tuxbury and Sons, and the other consisting of Samuel N. Stone, Shirley G. Stone and Frank B. Tracy under the firm name of Stone, Tracy and Company. The firm of Stone, Tracy and Company engaged in the same class of business as had theretofore been carried on by the old firm of Tuxbury and Stone and at the original stand. The firm of Dwight Tuxbury and Sons erected a new building next door and immediately north of the Stone, Tracy and Company stand and engaged in the same line of business. In the year 1900 the persons composing the firm of Stone, Tracy and Company, associating with themselves other persons, applied to and obtained from the state of Vermont a corporate charter and franchise to carry on a general mercantile business and under and by virtue of such charter and franchise so granted by the state of Vermont they organized a corporation called the Stone Tracy Company, one of the defendants, which took over all the business of the firm of Stone, Tracy and

Company and which has ever since been conducting a general mercantile business at the original stand of Tuxbury and Stone hereinbefore referred to. During each of the five years last past the defendant corporation has transacted a business of from not less than \$75,000 to \$100,000. Through unremitting and wise business endeavor the defendant corporation has prospered and has transacted a business approximating in volume that transacted during the same period by the firm of Dwight Tuxbury and Sons. The firm of Dwight Tuxbury and Sons and the defendant corporation have each continued to carry on a general retail mercantile business along similar lines next door to each other and in constant and active competition, with the result that there is now no other shop or store for the sale of general merchandise in the village or township of Windsor and no other such shop or store of anywhere near their size or importance within an area of twenty square miles.

*Fifth.* Your orator further shows that the said charter and franchise were granted and obtained for a large and valuable consider-

ation paid by the incorporators to the state of Vermont at the date of the incorporation of the defendant corporation and that the said charter and franchise have since then been continued in force by the state of Vermont in consideration of annual payments, called franchise taxes, paid by the defendant corporation to the state of Vermont.

5 *Sixth.* Your orator further shows that she is a citizen of the state of Vermont and a resident of the town of Windsor in the District and State of Vermont and that by the Probate Court for the District of Windsor and State of Vermont, the said court having jurisdiction in the premises, she was duly appointed General Guardian of the property of Samuel N. Stone, Junior, a minor, by order of said Probate Court duly entered and filed the 20th day of November, 1899, and that she immediately duly qualified as such guardian and ever since has been acting in that capacity. And your orator further shows that at the date of the incorporation of the defendant corporation she became as such guardian the owner and holder of forty shares of the capital stock in said defendant corporation and that she ever since has been and still is a stockholder in the defendant corporation owning and holding in her right as Guardian aforesaid the said forty shares of its capital stock. The capital stock of the defendant company is divided among a number of different persons and this suit is for an object common to them all. Your orator, therefore, brings this suit in her own name as such Guardian and in that behalf as a stockholder in said corporation and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

6 *Seventh.* Your orator further shows that as she is informed and verily believes the defendant corporation and a majority of its directors who are managing and conducting its property, affairs and concerns assume to believe that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes", approved August 5, 1909, the defendant company is required to make, on or before the 1st day of March, 1910, to the collector of internal revenue for the district in which the defendant corporation has its principal place of business, a true and accurate return under oath or affirmation of its president, vice president or other proper officer and its treasurer or assistant treasurer, setting forth, among other things, the total amount of the bonded and other indebtedness of the defendant corporation at the close of the year 1909, the gross amount of the income of the defendant corporation received during the year 1909 from all sources, the amount received by the defendant corporation within the year 1909 by way of dividends upon stock of other corporations, the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of the defendant corporation during the year 1909, stating separately all charges such as rentals or franchise payments required to be made



as a condition to the continued use or possession of property, the total amount of all losses actually sustained during the year 1909 and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, the amount of interest actually paid within the year 1909 on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the paid-up capital stock of the defendant corporation outstanding at the close of the year 1909 and the amount paid by the defendant corporation during the year 1909 for taxes imposed under the authority of the United States or any state or territory thereof and the net income of the defendant corporation for the year 1909 after making the deductions authorized in Section 38, subdivision 3rd, of the said Act, and by virtue of said Act is required to pay on or before the 30th day of June, 1910, an assessment described in said Act as a special excise tax with respect to the carrying on

7 or doing business by the said corporation equivalent to one per centum upon the entire net income over and above five thousand dollars (\$5,000) received by it from all sources during the year 1909, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax thereby imposed. And your orator shows that as she is informed and verily believes they intend to require the officers of the defendant corporation specified in said Act to make and file with the said collector of internal revenue the return aforesaid as prescribed in the said Act and intend to pay the said assessment if any shall be levied.

*Eighth.* Your orator further shows that pursuant to the terms of said Act the said return, if made, and the returns of other corporations, if made, shall as received by the collector of internal revenue be transmitted forthwith by the collector to the commissioner of internal revenue; that all such returns shall be retained by the commissioner of internal revenue who shall make assessment thereon on or before the first day of June, 1910, and that when the assessment is so made all of the said returns, including that of the defendant corporation, shall be filed in the office of the commissioner of internal revenue and shall constitute public records and be open to inspection as such.

*Ninth.* Your orator further shows that, as she is informed and verily believes, the inventory and the taking account of stock of the defendant corporation and the figuring of its income, expenditures, profits and losses for the year 1909 are not yet complete and that she

8 does not know and therefore cannot allege the amount of the net income of the defendant corporation for the year 1909; and your orator avers that an allegation of the amount of the net income of the defendant corporation should not, in any event, be required since such allegation, if made herein, would defeat in large part the object of this bill and would disclose to the said firm of Dwight Tuxbury and Sons and to the public generally a fact which your orator seeks by this bill and by the aid of this Honorable Court to keep private.

Your orator, however, further shows that as she is informed and

verily believes, the net income of the defendant corporation for the year ending Dec. 31, 1909, when ascertained according to the method prescribed in said Act, will be found to exceed the sum of five thousand dollars and that if the said return shall be made an assessment as provided in said Act will be made against the defendant corporation.

*Tenth.* Your orator further shows that, as she is informed and verily believes, in alleged compliance with the requirements of the Act of Congress aforesaid the defendant company and a majority of its said directors have avowed their intention and purpose voluntarily to make and file with the collector of internal revenue for the district in which the principal office of the defendant corporation is situated, prior to the first day of March, 1910, a return setting forth the business and income of the defendant corporation during the year 1909 as hereinbefore described and have likewise avowed their intention and purpose voluntarily to pay the said assessment if any is levied.

*Eleventh.* Your orator avers that the provisions of the tax on corporations provided for in the said Act of Congress as aforesaid are unconstitutional, null and void in that the requirement to make and file the said return and that the requirement that such return shall become a matter of public record and the requirement to pay said tax are burdens and taxes upon the said charter and franchise granted as aforesaid by the state of Vermont and on the right and power of the state of Vermont to grant, maintain and preserve the same to the defendant corporation, and are a burden and tax upon a prerogative, power, instrumentality and function of sovereignty belonging to the state of Vermont and which were never agreed to either expressly or by implication by the state of Vermont or the people of the state of Vermont at the time the said state was admitted into the Union, or before or since that time.

*Twelfth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void, and in violation of the fifth amendment of the Constitution of the United States in that under said provisions of law the defendant corporation will be deprived of its property without due process of law, and especially in this: that through the publicity of its business the privacy of its affairs will be largely destroyed, that its chief competitor, the said firm of Dwight Tuxbury and Sons, and all other persons will be able to gain an intimate knowledge of what have hitherto been the private affairs of the defendant corporation and its trade secrets while no corresponding publicity of the private affairs and trade secrets of the said firm of Dwight Tuxbury and Sons will be required and no similar invasion of the private affairs or trade secrets of the said firm of Dwight Tuxbury and Sons will be permitted; that the said assessment, if made, will be laid upon the defendant corporation and not upon its chief competitor, the said firm of Dwight Tuxbury and Sons, although said firm is carrying on the same character of business next door to the place of business of the defendant corporation and employing, as your orator is informed and verily believes, approximately the same

amount of capital; and that by reason of the said unjust advantage which would be given to the said firm of Dwight Tuxbury and Sons by a compliance with the said provisions of the said Act of Congress your orator avers that the business of the defendant corporation is dangerously threatened and that the defendant corporation will be forced to surrender to the state of Vermont the charter and franchise granted as aforesaid and which it now owns and has a right to enjoy and will be obliged to dispose of its assets, wind up its affairs and go into voluntary dissolution.

*Thirteenth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the fifth amendment to the Constitution of the United States in that under said provisions of law the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatever, and especially in this: that the private affairs, books, papers, records, business and trade secrets of the defendant corporation and the contents of its books, papers, and records are taken for publication and will be given to the collector of internal revenue and to the commissioner of internal revenue and to the public in the form of public records.

11 *Fourteenth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the fourth amendment to the Constitution of the United States and violate the right of the defendant corporation to be secure in its papers, effects, books records, business, private affairs and trade secrets against unreasonable searches and seizures, in this: That by said provisions of law the defendant corporation will be obliged to disclose to its chief competitor, the said firm of Dwight Tuxbury and Sons, and also to the collector of internal revenue and the commissioner of internal revenue and to the public, its papers, effects, books, records, business, private affairs and trade secrets and the contents of its papers, books and records in the respects hereinbefore specified and as specified in said Act.

*Fifteenth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the Constitution of the United States in that the depriving of the defendant corporation of its property without due process of law and the taking of the private property of the defendant corporation for public use without just compensation and the violation of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures as hereinbefore set forth, are a burden upon the said charter and franchise granted as aforesaid by the state of Vermont and upon the right and power of the State of Vermont to grant, maintain and preserve the same to the defendant corporation, and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the state of Vermont and

12 which were never agreed to either expressly or by implication by the State of Vermont or the people of the state of Vermont

at the time the said state was admitted into the Union or before or since that time.

*Sixteenth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the tenth amendment to the Constitution of the United States in that the requirements of said provisions are a burden and tax upon and an interference with the powers of the state of Vermont and the other states of the Union expressly reserved to charter and incorporate corporations and to grant charters and franchises to such corporations.

*Seventeenth.* Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the Constitution of the United States in that the said so-called special excise tax with respect to carrying on or doing business, is not, in reality, a special excise tax with respect to carrying on or doing business by the defendant corporation or by any corporation or joint stock company or association, except insurance companies, but is, in reality, a direct tax upon the said charter and franchise of the defendant corporation and the charters and franchises of all other corporations within the provisions of said Act and is not apportioned among the several states according to their population as required by the Constitution of the United States.

*Eighteenth.* Your orator further avers that if the said tax shall  
13 be held not to be a direct tax upon the charter and franchise of the defendant corporation and upon the charters and franchises of all other corporations, except insurance companies, within the provisions of said Act, then the said provisions are unconstitutional, null and void in that the said provisions and the said tax are not uniform throughout the United States or throughout any one of the United States or its territories or the District of Columbia or Alaska; and your orator avers that such provisions and the said tax are not uniform within the class or in respect to the property or subjects selected for taxation, except insurance companies, and that the said provisions and tax, while stated to embrace and affect and be levied upon the carrying on and doing of business in reality touch only corporations and joint stock companies, and leave free from the operation of said provisions and tax all individuals and co-partnership firms although carrying on and doing the same business or the same kind of business or the same class of business as the corporations and joint stock companies. And your orator further avers that in many other respects the said provisions and the said tax are not uniform throughout the United States and that the said provisions and tax are therefore unconstitutional, null and void.

*Nineteenth.* Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance and that she has duly requested the defendant corporation and its directors and each of them in writing to omit and refuse to prepare and file the said return and to refrain from paying the said tax and to contest

14 the constitutionality of the said provisions of law and to apply to a court of competent jurisdiction to determine the liability under the said provisions, and that a copy of said request is hereto annexed and marked "Exhibit A" and made a part of this bill of complaint; but that the defendant corporation and a majority of its directors have refused and still refuse and intend omitting to comply with your orator's demand and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the said provisions of the said Act of Congress and to make and file the return aforesaid with the collector of internal revenue and voluntarily pay the said assessment if any is made. A copy of the refusal of the defendant corporation and a majority of its directors is hereby annexed to this bill of complaint and marked "Exhibit B."

*Twentieth.* Your orator further shows that if the said return is made and filed it will result, as hereinbefore alleged, in great and irreparable injury to the defendant corporation and its business and to your orator and to all other stockholders of the defendant corporation and will involve the defendant corporation in great and irreparable damage, all to the irreparable damage of your orator and all of the stockholders of the defendant corporation.

*Twenty-first.* Your orator further shows that this is a suit of a civil nature in equity arising under a law of the United States providing internal revenue and properly cognizable by this honorable court.

All of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

15 Wherefore and in consideration whereof and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable,

Your orator prays:

1. That it may be adjudged and decreed that the said provisions of the said Act of Congress approved August 5, 1909, so far as the same relate to a tax upon corporations are unconstitutional, null and void.

2. That the defendants be restrained from voluntarily complying with the said provisions of the said Act of Congress and making the return above referred to or from paying the assessment if any is levied.

3. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said Stone Tracy Company, under its corporate seal, and the said individual defendants, not under oath—an answer under oath being hereby expressly waived—to each and all of the matters



and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto: may it please your honors to grant unto your orator a subpoena ad respondendum issuing out of and under the seal of this honorable court, to be directed to the said defendants, the Stone Tracy Company,

16 Frank B. Tracy, Ida S. Tracy and Leon B. Hayward commanding them and each of them on a certain day and under a certain penalty to be therein inserted to appear before your honors in this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises: and further to perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional injunction and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

ERNEST W. GIBSON,  
*Solicitor for Complainant.*

MAXWELL EVARTS,  
*Of Counsel.*

17 UNITED STATES OF AMERICA,  
*District of Vermont, ss:*

Stella P. Flint, being duly sworn, deposes and says that she is the General Guardian of the property of Samuel N. Stone, Jr., a minor, and as such General Guardian is the complainant named in the foregoing bill of complaint; that she has read the said bill and knows the contents thereof and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters she believes it to be true.

STELLA P. FLINT.

Subscribed and sworn to before me this 15th day of January, 1910.

GILBERT A. DAVIS,  
*Notary Public.*

[L. s.]

18 EXHIBIT A.

To Stone Tracy Company and the directors of said Company:

As General Guardian of the property of Samuel N. Stone, Junior, a minor, I am a stockholder in the Stone Tracy Company. I understand that the company intends to make a return of its business in conformity with the provisions of Act of Congress of August 5, 1909, relating to the corporation tax. These provisions, as I am advised by counsel, are and I claim them to be unconstitutional.

To make this return to the collector of internal revenue which will involve its early publication will obviously be a great disadvantage to the company and injurious to its business. I request that you will not voluntarily make and file this return or pay the tax if any is

assessed and I request that for the protection of the company, its business and its stockholders, you will contest the constitutionality of the provisions of this Act which require the making and filing of the return and the payment of the tax.

STELLA P. FLINT.

Dated Windsor, Vt., Jan. 1, 1910.

WINDSOR, VT., Jan. 3, 1910.

Mrs. Stella P. Flint, Windsor, Vt.

MADAM: In response to your letter of the 1st inst. we beg to say that while there may be doubt as to the constitutionality of the corporation tax, we do not feel it best for us to get into litigation with the government and we prefer to leave to some larger concern the responsibility and expense of contesting the law.

We may suggest, however, that if the corporation tax is enforced against us we can dissolve the company and form a firm to take over the business so that after this year we shall be outside the provisions of the law.

Yours very truly,

STONE TRACY COMPANY,  
By FRANK B. TRACY,  
*General Manager.*

FRANK B. TRACY,  
IDA S. TRACY,

*A Majority of the Directors of Stone Tracy Company.*

20 (Endorsed:) United States Circuit Court. District of Vermont. Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy, and Leon B. Hayward, Defendants. Bill in Equity. Filed January 15, 1910, Annie M. Brown, Deputy Clerk.

21 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,  
versus

STONE TRACY COMPANY, FRANK B. TRACY, IDA D. TRACY, and  
LEON B. HAYWARD, Defendants.

*The Demurrer of Stone Tracy Company and the Other Defendants Above-named to the Complainant's Bill of Complaint Herein.*

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein

set forth and alleged, do demur to the said bill and for cause of demurrer show that said bill doth not contain any matter of equity whereon this Court can ground any degree or give to the complainant any relief against these defendants or any one or more of them, and that it appeareth by the complainant's own showing by the said bill that she is not entitled to the relief prayed by the said bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

GILBERT F. DAVIS,

*Solicitor for Defendants.*

I, Gilbert F. Davis, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

GILBERT F. DAVIS.

UNITED STATES OF AMERICA,

*District of Vermont, ss.:*

I, Frank B. Tracy, being duly sworn, depose and say: That I am the General Manager of the above-named defendant, Stone Tracy Company, and am one of the individual defendants above-named and that the foregoing demurrer is not interposed for purposes of delay.

FRANK B. TRACY.

Sworn to before me, this 15th day of January, 1910.

[Seal Gilbert F. Davis, Notary Public, Windsor County,  
State of Vermont.]

GILBERT F. DAVIS,

*Notary Public.*

(Endorsed:) Stella P. Flint vs. Stone Tracy Co., et al.  
United States Circuit Court, District of Vermont. Demurrer.  
Gilbert F. Davis, Solicitor for Defendant. Filed January 15, 1910,  
Annie M. Brown, Deputy Clerk.

24 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel  
N. Stone, Junior, a Minor, Complainant,  
versus  
STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and  
LEON B. HAYWARD, Defendants.

Please take notice that this cause will be brought to a hearing on bill and demurrer filed therein before Honorable James L. Martin, District Judge, on the 20th day of January, 1910 at 9.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated Brattleboro, Vermont, January 15th, 1910.

ERNEST W. GIBSON,  
*Solicitor for Complainant, Brattleboro, Vermont.*

To Gilbert F. Davis, Esq., Solicitor for Defendants, Windsor, Vermont.

25 (Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy and Leon B. Hayward, Defendants. Notice of Hearing. Due and timely service of the within notice is hereby admitted. Jan. 15, 1910. Gilbert F. Davis, Solicitor for Defendants. Filed January 15, 1910, Annie M. Brown, Deputy Clerk.

26 At a Term of the Circuit Court of the United States for the District of Vermont, Held at the United States Court House at Brattleboro, Vermont, this 20th day of January, 1910.

Present: Hon. James L. Martin, District Judge.

In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel  
N. Stone, Junior, a Minor, Complainant,  
versus  
STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and  
LEON B. HAYWARD, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here—

Ordered and decreed that the said demurrer be sustained and that the bill of complaint above-named be and the same is hereby dismissed with costs.

JAMES L. MARTIN,  
*U. S. D. Judge.*

Thereupon, the above-named complainant states that in this case the constitutionality of a law of the United States is drawn in question, and in open Court prays an appeal from said final decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. It is, therefore, further—

Ordered that the said appeal be and the same hereby is allowed as prayed for in open Court.

The said defendants then admitted in open Court due notice of the said appeal and duly waived service of any citation thereon.

JAMES L. MARTIN,  
*U. S. D. Judge.*

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian, etc., Complainant, vs. The Stone Tracy Company et al., Defendants. Final decree sustaining Demurrer and allowing appeal. Gilbert F. Davis, Solicitor for Defendant. Filed January 20, 1910. Frederick S. Platt, Clerk.

28 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,  
versus

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD, Defendants.

And now comes the complainant above-named by Ernest W. Gibson Esq., her solicitor, and in connection with the complainant's petition of appeal from the final decree made and entered herein on the 20th day of January, 1910, dismissing the complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided:

### I.

That the Court erred in not holding that so much of the act of Congress of the United States, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes", approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations and the filing of returns of corporations, as specified in section 38 of the said act, was unconstitutional and void, in that such section violates sections 2 and 8 of Article I. and amendments IV., V., and X. of the Constitution of the United States.

### II.

That the Court erred in not granting to the complainant the relief prayed in and by her bill or any part thereof.

### III.

That the Court erred in sustaining the demurrer to said bill.



## IV.

That the Court erred in dismissing the said bill with costs.

Dated Brattleboro, Vermont, January 20, 1910.

ERNEST W. GIBSON,  
*Solicitor for Complainant.*

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian, Complainant, vs. The Stone Tracy Company et al., Defendants. Assignments of Errors. Ernest W. Gibson, Solicitor for Complainant. Filed January 20, 1910. Frederick S. Platt, Clerk.

30 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,

versus

STONE TRACT COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD, Defendants.

Know all men by these presents, that we, Stella P. Flint and Walter J. Saxie of Windsor in the County of Windsor and State of Vermont, are held and firmly bound unto the above-named defendants in the sum of Five Hundred Dollars (\$500) to be paid to the said defendants; for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 20th day of January, in the year of our Lord one thousand nine hundred and ten.

The condition of this obligation is such that,

Whereas, the said defendants above-named have obtained a decree in the Circuit Court of the United States for the District of Vermont sustaining the defendants' demurrer and dismissing the bill of complaint of the complainant with costs, which said decree was entered on the 20th day of January, 1910, and

31 Whereas, the said complainant, in order to obtain the reversal of the same hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States;

Now, therefore, if the above-named Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Jr., a minor, shall prosecute her said appeal to effect, and if she fail to make her appeal good, shall answer all damages and costs, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

STELLA P. FLINT. [L. s.]  
WALTER J. SAXIE. [L. s.]

Sealed and delivered and taken and acknowledged this 20th day of January, 1910.

[SEAL.]

FRANK H. CLARK,  
*Notary Public.*

Approved by:

JAMES L. MARTIN,  
*U. S. D. Judge.*

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint as General Guardian, etc., Complainant, vs. The Stone Tracy Company et al., Defendants. Bond on Appeal. Ernest W. Gibson, Solicitor for Complainant. Filed January 20, 1910. Frederick S. Platt, Clerk.

32 UNITED STATES OF AMERICA,  
*District of Vermont, ss:*

I, Frederick S. Platt, Clerk of the Circuit Court of the United States of America for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty-one inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy and Leon B. Hayward, Defendants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said Court to be hereunto affixed, at Brattleboro, in the District of Vermont, in the Second Circuit, this 20th day of January, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fourth.

[Seal of the U. S. Circuit Court, Dist. of Vermont.]

FREDERICK S. PLATT, *Clerk.*

Endorsed on cover: File No. 21,973. Vermont C. C. U. S. Term No. 747. Stella P. Flint, as general guardian of the property of Samuel N. Stone, Junior, a minor, appellant, vs. Stone Tracy Company et al. Filed January 21st, 1910. File No. 21,973.

**Supreme Court of the United States**

**DECEMBER TERM, 1900.**

**No. 245**

**407**

**FILED**

**JAN 22 1901**

**JAMES H. McKENNEY**

**STELLA F. FLINT**, as General Guardian of the  
Property of **SAMUEL H. STONE, Junior**, a minor,

*Appellant.*

**vs.**

**THE STONE TRACY COMPANY, FRANK B.**  
**Tracy, Ida S. Tracy, and LEON B. HAYWARD,**

*Appellees.*

**APPEAL FROM THE CIRCUIT COURT OF THE**  
**UNITED STATES FOR THE DISTRICT**  
**OF VERMONT**

**MOTION TO ADVANCE UNDER RULE 24**

**MAXWELL EVARTS,**

*Attorney for Appellant.*

# Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT as General  
Guardian of the property of  
SAMUEL N. STONE, Junior, a  
minor,

Appellant,

*vs.*

THE STONE TRACY COMPANY,  
FRANK B. TRACY, IDA S. TRACY  
and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE  
CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF VERMONT.

## MOTION TO ADVANCE UNDER RULE 26.

*To the Honorable the Chief Justice and Associate Jus-  
tices of the Supreme Court of the United States:*

### I.

In this cause the constitutionality of a law of the United States is drawn in question. The complainant specifically alleges that the provisions of the Act of Congress, approved August 5, 1909, and entitled "An Act to provide

revenue, equalize duties and encourage the industries of the United States and for other purposes," so far as they relate to the so-called "corporation tax" are unconstitutional.

The complainant, as a stockholder of the defendant corporation, has brought this suit in her own behalf as guardian of a minor (and in behalf of other stockholders similarly situated) against the defendant corporation and its directors, alleging that the defendants, in compliance with such act, purpose making a return of the net income of the defendant corporation and also purpose paying a tax, if any shall be levied, on such net income in excess of \$5,000. She alleges that the provisions of law which purport to require the making of such return and the payment of such tax are unconstitutional, and she seeks to restrain the threatened voluntary compliance by the defendants with such provisions on the ground that it would be a breach of trust in disclosing the private affairs of the defendant corporation and diverting its funds. The case, therefore, presents a ground for the intervention of a court of equity and the circuit court had jurisdiction of the cause as one arising under a law of the United States providing internal revenue.

## II.

Briefly, the bill alleges that the defendant corporation is a trading company carrying on a retail mercantile business in active competition with another trading company carrying on the same line of business, but as a co-partnership; that the co-partnership is not required by the Act in question to make any return or pay any tax; that the provisions of law requiring the making and publishing of a return and the paying of the tax not only work an undue advantage to the co-partnership firm and other competitors of the defendant corporation and work a corre-



sponding disadvantage to the defendant corporation, but are, in effect, an unconstitutional invasion of the right of the State of Vermont to grant and preserve to the defendant corporation a corporate charter and franchise; that the above discrimination between the defendant corporation and the co-partnership amounts to a taking of the property of the defendant corporation without due process of law; that the publishing of the return involves the taking of private property for public use without compensation; that the corporation tax is a direct tax upon the franchise of the defendant corporation and not apportioned as direct taxes are required to be; that if it is not a direct tax, then the inclusion of corporations and the exclusion of co-partnerships and individuals, though engaged in the same business, prevent the corporation tax from being uniform throughout the United States.

### III.

The cause came on to be heard on bill and demurrer in the United States Circuit Court for the District of Vermont, whence, the demurrer being sustained, the complainant prayed an appeal to the Supreme Court of the United States, which was duly allowed.

### IV.

The case involves issues of public importance. A decision in this cause affects a great majority of the corporations in the United States. The terms of the Act in question, unless some extension of time can be obtained by public authority, require the return of the income of the defendant corporation and all other corporations within the provisions of the Act to be made and filed on or before the first day of March, 1910.

## V.

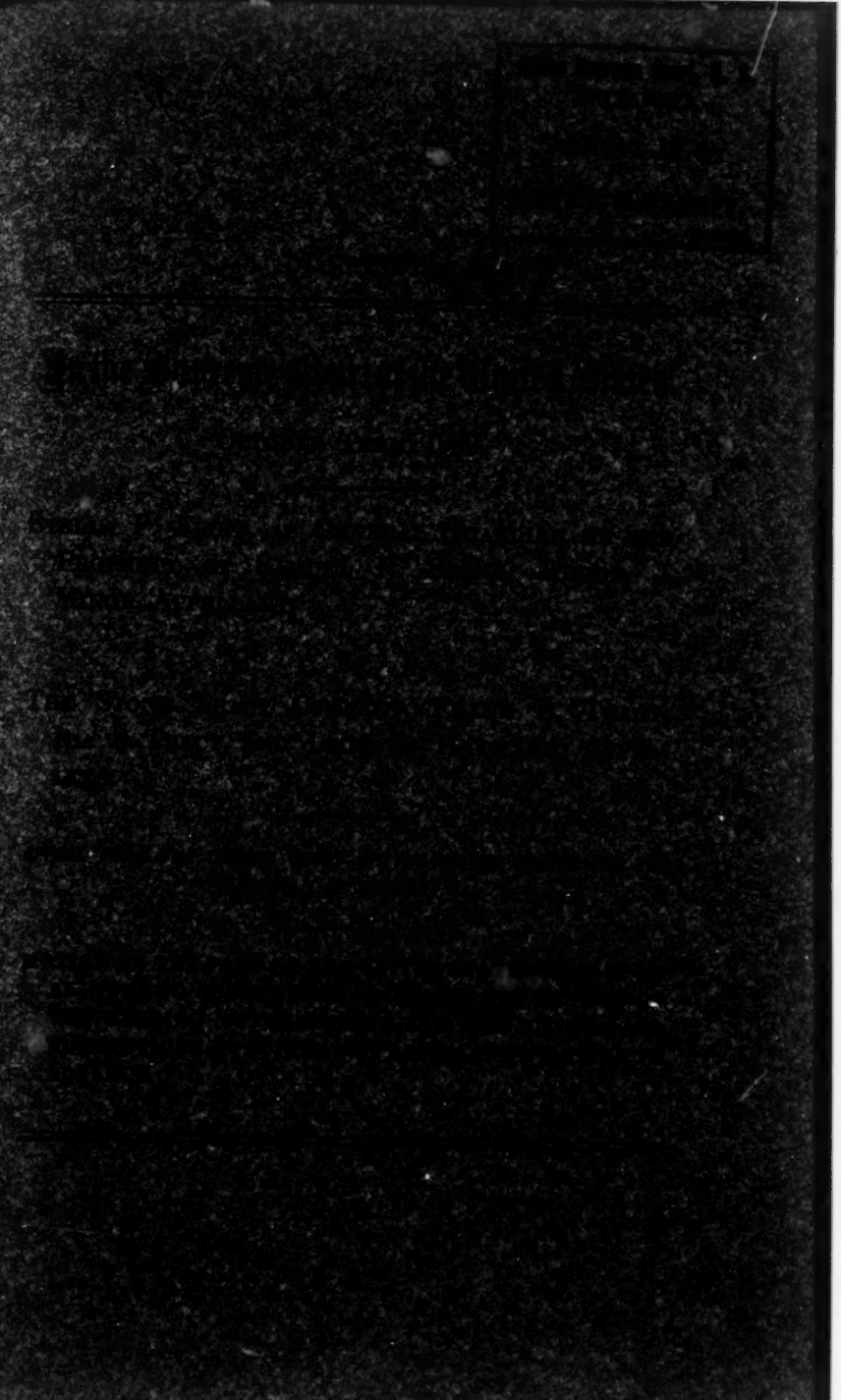
The appellant, therefore, prays this Honorable Court that this case may be advanced upon the docket and heard at as early a day as may be convenient to the Court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the Clerk of this Court. Notice has likewise been given to the Attorney-General of the United States and to the Solicitor General of the United States.

Washington, January 21, 1910.

Respectfully submitted,

MAXWELL EVARTS,  
Of Counsel for Appellant.



# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

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STELLA P. FLINT, AS GENERAL GUARDIAN  
of the property of Samuel N. Stone,  
junior, a minor, appellant,

v.

THE STONE TRACY COMPANY, FRANK B.  
Tracy, Ida S. Tracy, and Leon B. Hay-  
ward, appellees.

No. 747.

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*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE  
DISTRICT OF VERMONT.*

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**MOTION ON THE PART OF THE UNITED STATES THAT IT BE  
ALLOWED TO SUBMIT ORAL ARGUMENT AND BRIEF UPON  
THE HEARING OF THE ABOVE-ENTITLED CAUSE; AND  
SUGGESTIONS IN SUPPORT OF APPELLANT'S MOTION TO  
ADVANCE.**

On behalf of the United States the Solicitor-General moves the court that the United States may submit both oral argument and brief upon the hearing of this cause, and also offers these suggestions in aid of appellant's motion that the cause be advanced for hearing at the present term.

1. The suit presents the general question of the constitutionality of the so-called "Federal corporation tax," imposed by section 38 of the act of Congress of August 5, 1909 (36 Stat., 11), as "a special excise

tax with respect to the carrying on or doing business" by "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia."

2. Verified returns are required to be made by the corporation "on or before the first day of March, nineteen hundred and ten" (third paragraph of the act), as a basis for ascertainment and collection of the tax against it. Payment of the tax is required "on or before the thirtieth day of June" next, and heavy penalties are imposed for failure of such timely payment (fifth paragraph of the act).

3. Among the many specific questions of the highest importance which are involved in the general inquiry concerning the constitutionality of this taxing law are the following:

Whether the tax is direct in the constitutional sense and is void because not apportioned among the States in proportion to their population.

Whether the tax improperly interferes with the general power of the States to create corporations.

Whether the tax is invalid in so far as the net income of a corporation may be attributable to

state or municipal bonds held by the corporation as part of its business capital.

Whether the tax is invalid in the case of public-service corporations chartered by a State.

Whether the taxing act makes an improper distinction between corporations on the one hand and partnerships and individuals on the other hand, engaged in the same business.

Whether the exemptions enumerated in the statute are sustainable.

4. The deep interest of both the Government and of citizens affected by the tax throughout the country in a determination by this court concerning the constitutionality of the taxing act before the close of the period for payment of the tax, June 30 next, is apparent; and the Government therefore expresses its entire accord with the motion which appellant has submitted that the cause be advanced and set for hearing on a day during the present term.

LLOYD W. BOWERS,  
*Solicitor General.*

JANUARY, 1910.



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# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~747~~

407

Supreme Court U. S.  
FILED

MAR 9 1910

JAMES H. MCKENNEY,  
Clerk.

STELLA P. FLINT, as General Guardian of the  
Property of SAMUEL N. STONE, Junior, a Minor,

*Appellant,*

*vs.*

STONE TRACY COMPANY, FRANK B. TRACY,  
IDA S. TRACY, and LEON B. HAYWARD,

*Appellees.*

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APPEAL FROM THE CIRCUIT COURT OF THE  
UNITED STATES FOR THE DISTRICT  
OF VERMONT.

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## BRIEF FOR APPELLANT.

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MAXWELL EVARTS,  
HENRY S. WARDNER,

*of Counsel for Appellant.*

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# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT, as General  
Guardian of the Property of  
Samuel N. Stone, Junior, a  
Minor,

Appellant,

*vs.*

STONE TRACY COMPANY, FRANK  
B. TRACY, IDA S. TRACY, and  
LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF VERMONT.

## BRIEF OF THE APPELLANT.

### Statement.

In the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership for carrying on a general retail mercantile business in the village of Windsor, Vermont, and that firm, called Tuxbury & Stone, carried on such business continuously, on the main street of the village, for upwards

of twenty-nine years. The business was prosperous, and its shop became the principal one of its kind, not only in the village, but in an area of some ten square miles of the surrounding country. While the firm, from time to time, took in other partners, there was no essential change in the management until 1895, when the firm dissolved and two new firms were formed therefrom. One of the new firms was headed by Tuxbury, and was styled Dwight Tuxbury & Sons, while the other was headed by Stone, and was styled Stone, Tracy & Company.

The firm of Stone, Tracy & Company retained the original stand of Tuxbury & Stone, and engaged in the same business as had been carried on by the old firm. The firm of Dwight Tuxbury & Sons erected a building on the same street, and next door to Stone, Tracy & Company, and engaged in the same line of business.

In the year 1900 the persons composing the firm of Stone, Tracy & Company obtained from the State of Vermont a corporate charter, and, under such charter, organized a corporation, called the Stone Tracy Company, for carrying on a general retail mercantile business. The defendant corporation is the corporation so formed. It took over all the business of the firm of Stone, Tracy & Company, and has continued to carry on at the original stand of Tuxbury & Stone a general retail mercantile business. In carrying on such business it has met the direct, active, and constant competition of the firm of Dwight Tuxbury & Sons, which firm has continued to carry on a general retail mercantile business next door to the shop of the defendant corporation and employing about the same amount of capital. The defendant cor-

poration has prospered, and has transacted, during each of the last five years, a business of not less than from \$75,000 to \$100,000, which, in volume, approximates that carried on by its competitor. Continuing to compete next door to each other, these two shops have become the only general merchandise shops in the village, and the principal ones in a surrounding area of twenty square miles.

A return of the business of the defendant corporation if made as required by the provisions of the Act of Congress of August 5, 1909, relating to the so-called "corporation tax," through becoming a public record, will disclose to the firm of Dwight Tuxbury & Sons and to the public generally the gross income of the defendant corporation, its indebtedness, its dividends received, its expenses paid, its charges for depreciation, its rentals and franchise payments, its losses sustained, the interest paid on its debts, the amount of its taxes and its net income. The net income of the defendant corporation will exceed \$5,000, and the corporation tax will therefore be assessed. Since, under the provisions of the law, no such return and no such tax can be required of copartnerships, the firm of Dwight Tuxbury & Sons would be given a great advantage over the defendant corporation through the disclosure of the details of the business and private affairs and trade secrets of the defendant corporation, while no such disclosure of the affairs of the firm of Dwight Tuxbury & Sons would be required or permitted. The advantage thus given to the competitor of the defendant corporation would compel the defendant corporation to surrender its corporate charter, dispose of its assets and go into voluntary dissolution.

The complainant, as a stockholder of the Stone Tracy Company, requested the defendants to contest the constitutionality of the corporation tax law and not to comply with its provisions, but the defendants refused to do so and assert that they intend to make the return and pay the tax.

Thereupon the appellant, who was the complainant in the Court below, brought, in the United States Circuit Court for the District of Vermont, her bill in equity as a stockholder in the defendant corporation to restrain it and its directors from voluntarily making the return of income and other details of its business, as required by the so-called "corporation tax" provisions of the Act of Congress of August 5, 1909, and from paying the tax. She averred in her bill that the law was an invasion of the power of the State of Vermont to grant and preserve the charter of the defendant corporation, that making and publishing the return and paying the tax would be a taking of property without due process of law, and a taking of private property without just compensation, that the law violates the right of the defendant corporation to be secure in its papers and effects from unreasonable searches and seizures, that it imposes a direct and unapportioned tax on the franchise of the defendant corporation, and that if the tax is not direct it is not uniform throughout the United States.

She further averred that the defendants in intending voluntarily to comply with the act were intending to commit a breach of trust in disclosing to the chief competitor of the defendant corporation and to the public the private affairs of the defendant corporation and diverting its funds.

The case was one within the jurisdiction of the Circuit Court by virtue of Section 629, Subdivision 4, of the Revised Statutes of the United States, as one arising under a law providing internal revenue. The defendants demurred for want of equity. The Circuit Court sustained the demurrer and dismissed the bill and the complainant, setting forth that in this case the constitutionality of a United States statute was drawn into question, prayed an appeal to this Court, which was duly allowed.

The provisions of the "Corporation Tax Law" which are particularly discussed in this brief follow:

"SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed \* \* \*."

Subdivision third of the above section requires every corporation subject to the provisions of the law to make and file a return showing the details of its business.

"SIXTH. When the assessment shall be made, as provided in this section, the returns, together with

any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

#### SPECIFICATION OF ERRORS.

The Court below erred :

FIRST. In sustaining the demurrer of the defendants.

SECOND. In not overruling the demurrer of the defendants.

THIRD. In not holding that the corporation tax law of August, 1909, is unconstitutional for the reason that the corporate franchise granted to the Stone Tracy Company by the State of Vermont is not a legitimate subject of taxation by the general government, and for the further reason that such taxation is a violation of the Tenth Amendment to the Constitution.

FOURTH.—In not holding said law unconstitutional for the reason that it is unequal, unjust and oppressive in that it singles out for taxation from all the men doing business in this country those alone who do their business in a corporate capacity, leaving untaxed their competitors doing business in an individual or a partnership capacity, and that such an unequal law deprives the Stone Tracy Company of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Federal Constitution.

FIFTH. In not holding the said law unconstitutional for the reason that the provision requiring the publicity of the affairs of the Stone Tracy Company after the government has finished with the return and has levied the tax takes from said corporation its property, *i.e.*, its right to the privacy of its affairs, for a public use, without just compensation.

## FIRST POINT.

**The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the State of Vermont.**

### A.

THE TAX AND THE OTHER BURDENS OF THE CORPORATION TAX LAW FALL UPON THE CORPORATE FRANCHISE OF THE DEFENDANT CORPORATION.

In his message sent to Congress June 16, 1909, the President, suggesting the passage of the corporation tax, said :

“ I therefore recommend an amendment to the tariff bill imposing upon all corporations and joint stock companies for profit, except national banks (otherwise taxed), savings banks, and building and loan associations, an excise tax measured by 2 per cent. on the net income of such corporations. *This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock*” (44 Cong Rec. 3450).

On June 24, prior to the introduction of the corporation tax amendment, Senator Newlands said :

“ If, however, it be held that the suggested tax is, as the President asserts, ‘ a tax upon the privilege of doing business as an artificial entity,’ that is to say, a tax upon the right to be a corporation, it will probably be contended that the corporate franchise is the creation of the state sovereignty ; that the power to tax is the power to destroy ; and that the Nation has no power, for this reason, to tax the franchise granted by the State? ” (44 Cong. Rec. 3821.)



On the following day the corporation tax amendment was introduced in substantially the form that it was finally adopted. It provided:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to 2 per cent upon the entire net income over and above \$5,000 received by it from all sources during such year \* \* \* \*," (44 Cong. Rec., 3915.)

The amendment was redrafted and substantially re-introduced on June 29, but the provisions above quoted were not changed by that amendment. (44 Cong. Rec., 4029.)

In attempting to reply to Senator Brandegee's inquiry as to whether the tax was not on the privilege to do business, Senator Carter had this to say:

"Mr. Carter: Mr. President, the Senator's discussion is very interesting and very instructive. According to my view, the Federal Government does not assume by the passage of this amendment to extend any privilege to any corporation in a State or to deny any right or privilege now enjoyed by a corporation organized by a State. The amendment merely proposes a classification of subjects for taxation. The corporation is not to be assessed for the privilege of doing business, because that privilege can not be denied if the corporation is organized under the laws of a State, if its purposes are legitimate and not in contravention of public policy. *The tax is assessed because certain business is being done in a certain form or method of organization, by incorporation or as joint-stock companies. It is not a license and not a tax on property, but a tax on that method of doing business, and because the business is being done under that legal form.*

"Mr. Brandegee. Does the Senator from Montana claim that where a State charters a corporation the United States Government can definitely impose a tax upon that corporation because it has presumed to exist under the laws of its own State?

"Mr. Carter. Well, Mr. President, unquestionably in the levying of the tax on bank circulation Congress did interpose its hand and levy a tax which operated to extinguish the banks of issue in the States" (44 Cong. Rec., 4090).

Senator Root, in his defense of the measure had placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange and, quoting from the opinion in *Nicol v. Ames* (173 U. S., 509), said:

" \* \* \* It is a tax upon the facility or privilege of doing business in this way.' The objection was made that the tax was one upon a sale of merchandise made in one place, to wit, in the board room, when no tax was imposed upon the sale of the same merchandise in another place, to wit, out of the board room. The Court said: 'That makes no difference. There is a certain facility, a certain privilege, a certain opportunity of doing this business in the way afforded by this company; and the United States can impose a tax upon that.' And supported it" (44 Cong. Rec., 4070).

The next day, when pressed further by Senator Brandegee's questions on this point, Senator Root suggested that he would be "very glad if the Senator from Maryland [Mr. Rayner] might make a part of my answer to the question of the Senator from Connecticut" (44 Cong. Rec., 4090); and Senator Rayner, falling back on Senator Root's own words, explained the meaning of the tax as follows:

"Mr. Rayner: This is a tax upon the privilege and

the business of a corporation and the facilities of a corporation." \* \* \*

"It is a tax on the privilege and facility of a corporation. It is just as the Senator from New York said yesterday. It could not have been stated better.

"Said the Senator from New York :

"It is not the profits that would be subject to the tax, but the privilege or facility of transacting the business through corporation form. It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility or privilege which is taxed" (44 Cong. Rec., 4094).

We thus have, if it were needed, the admission of leading lawyers of both parties in the Senate that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

The amendment was agreed to on July 2 (44 Cong. Rec., 4115), exactly one week from the day it had been introduced and, in the particulars quoted above, is the precise wording of the law as finally enacted except that the rate of the tax was reduced to one per centum.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and we assert that no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. Not a single demonstration of its validity as a franchise tax was made or even attempted by any Senator. Senator Root's paragraph (44 Cong. Rec., p. 4070), skims lightly over the thinnest ice. He mentions *Veazie Bank v. Fenno* (8 Wall. 533) and offers no reason. Senator Rayner, misled against his instinct and his better judgment by a hasty reading of the same case,

conceded without argument the vital point (44 Cong. Rec., p. 4097). Senator Brandegee and Senator Overman doubted and again and again pleaded for light and reason (44 Cong. Rec., pp. 4088-94, 4144). No light was shed. No reason was given. Except for Senator Bristow's short speech (44 Cong. Rec., p. 4102), Senator Cummins, alone, vigorously attacked the measure as unconstitutional upon the grounds we now urge (44 Cong. Rec., pp. 4143-4), but his argument was unheeded, unanswered and perhaps unheard. That there was no answer is not remarkable.

We do not apprehend that we can add materially to what has been said by Senators Root and Rayner on the character of the tax. It is true the law contains the words "with respect to the carrying on or doing business," but those words were merely inserted because of their similarity to words contained in Mr. Justice HARLAN's opinion in the case of *Spreckels Sugar Refining Company v. McClain* (192 U. S., 397). We revert once more to the Senate debate:

"Mr. Brandegee: \* \* \* \* I should like to ask the Senator from New York if he understands the words 'with respect to' the transaction of their business to be equivalent to a tax imposed upon their right or privilege to transact business?"

"Mr. Root: I say I think the words 'with respect to the carrying on or doing business by such corporation' do include the meaning of the words used by the Senator from Connecticut.

"Mr. Brandegee: I should like to ask the Senator also if they include anything else?"

"Mr. Root: I am not prepared to say on the moment whether something more may not be found in them. I am quite sure they do not and can not include anything more than the very relation between

the tax and the carrying on or doing of the business which the Supreme Court has declared to be lawful as a method of taxation under the Constitution, because these words are the words which the Supreme Court itself uses in declaring a tax to be lawful" (44 Cong. Rec. 4088).

Since individuals or co-partnerships, though carrying on the same character of business as corporations, are exempt from the operation of the law we see that corporations are taxed not on account of the character of their business but on account of their being corporations and acting in a corporate capacity. To illustrate: The defendant corporation carries on a general retail mercantile business and is subject to all the burdens of this law, while the co-partnership of Dwight Tuxbury & Sons, carrying on the same kind of business, employing the same amount of capital and in the building adjoining that of the defendant corporation, is wholly exempt. The sole distinction between these two concerns is that one has a corporate charter and franchise from Vermont and does its business by virtue thereof in a corporate capacity while the other is a co-partnership.

The burdens of this law, therefore, fall on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity.

For persons to be a corporation and for persons to act in a corporate capacity are one and the same thing and this thing is a corporate franchise. We take this as established beyond dispute from the language of Mr. Justice FIELD in *Home Insurance Co. v. New York*, 134 U. S., 594 (1890), where, in speaking of the New York

tax on the "corporate franchise or business" of a corporation, he said at p. 599:

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do a business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy."

But in addition to the franchise to be a corporation and to act in a corporate capacity there is, in every corporation, the so-called franchise to do the particular business for which it was incorporated. The distinction between these two franchises is quite clearly drawn by Mr. Justice CURTIS in *Hall v. Sullivan Railroad Co.*, 11 Fed. Cas., 257 (1857), where he points out that among the franchises of a railroad company are, first, that of being a body politic with rights of succession of members and of acquiring, holding and conveying property and suing and being sued by a certain name, and, second, to build, own and manage a railroad and take tolls thereon. That de-

cision was quoted by this Court in *Memphis Railroad Co. v. Commissioners*, 112 U. S., 609 (1884), and in the latter case Mr. Justice MATTHEWS said at page 619:

“The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises.”

And while the franchise to do, as distinguished from the franchise to be, does not include things which may not naturally be done by individuals, the right of the corporation to do is, nevertheless, limited and defined by the terms of its charter. On this point this Court said by Mr. Justice FIELD in *Horn Silver Mining Co. v. New York*, 143 U. S., 305, 312 (1892):

“A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter.”

Thus, while the members of a corporation could, prior

to their incorporation, do the things which after incorporation they do in a corporate capacity, they are limited as a corporation to doing such things or business as their charter provides.

The persons who received from the State of Vermont the charter of the defendant corporation had previously done, as individuals and a co-partnership, those things which they now do in a corporate capacity. But it is not those things that the corporation tax law touches. Were it so, the firm of Dwight Tuxbury & Sons would be within the law. The law, therefore, does not touch those natural rights which, though specified in the charter and which by virtue of permissive language in the charter are sometimes termed a franchise or a secondary franchise, but it touches merely the real or primary franchise of being a corporation and acting in a corporate capacity which could be owned by the incorporators only by virtue of the charter from the State of Vermont.

The burdens of this law, therefore, falling on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity are, with equal certainty, burdens upon the right to be a corporation and to act as such. This is because the Court always looks through the form to the substance and effect of the tax. We quote on this point both from the opinion of this Court and from one of the dissenting opinions in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 429 (1894). In this case Chief Justice FULLER said at page 581:

“It is the substance and not the form which controls as has indeed been established by re-



peated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in the case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins v. Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy v. California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co. v. Jackson*, 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook v. Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S., 326, and *Leloup v. Mobile*, 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon commerce itself, and therefore unauthorized."

In the same case (158 U. S., 601), Mr. Justice BROWN said at page 691 :

"Thus in *Brown v. Maryland*, 12 Wheat., 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston v. Charleston*, 2 Pet., 449, a tax upon stock for loans to the United States was held invalid as a tax upon the functions of the government; in *Dobbins v. Commissioners*, 16 Pet., 435, a state tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cars*, 7 How., 283, a tax upon alien passengers arriving in ports of the state was held void as a tax upon commerce; in *Almy v. California*, 24 How., 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall v. Nevada*, 6 Wall., 35, a tax upon railroads and stage companies for every passenger carried out of the state was held to be a tax on the passenger for the privilege of passing through the state; in *Pickard v. Pullman Southern Car Co.*, 117 U. S., 34, a tax upon Pullman cars running between different states was held to be bad, a tax upon interstate commerce; and in *Leloup v. Mobile*, 127 U. S., 640, a similar ruling was made with regard to a license tax for telegraph companies; and finally, in *Cook v. Pennsylvania*, 97 U. S., 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable."

We think there can be no doubt that a court which has decided that an income tax assessed against persons in respect to the interest from their holdings in municipal bonds is an unconstitutional invasion of the sovereignty of a State because affecting its power to borrow will also decide that a tax levied solely on corporations is a burden on the franchises of corporations. It must be borne in mind, moreover, that the tax of one per cent. of income over \$5,000 is but one of the burdens imposed upon the defendant corporation by this extraordinary law.

The burdens of the corporation tax upon the franchise of the defendant corporation are not to be likened to those taxes which States impose on corporate franchises of their own creation or on the privilege accorded to foreign corporations to do business within those States. The theory of such taxes we explain at length in the second point of this brief.

## B.

### STATE TAXATION OF FEDERAL INSTRUMENTALITIES.

We believe that until the year 1870 no Federal tax had been checked by this Court on the ground that it invaded the sovereignty of a State; but long before that date this Court was called on to declare and did declare that a certain State tax invaded the sovereignty of the United States. The case to which we refer is *McCulloch v. Maryland*, 4 Wheaton, 316, decided in 1819, and it is, as we think, the first case in which any tax, State or Federal, was declared in part unconstitutional for invading the sovereignty of the United States or one of the States. That case, while not involving a corporation tax and, therefore, not apposite in its facts to the case now before the Court, nevertheless furnishes the groundwork for the principle on which we rely. In that case the legislature of the State of Maryland on February 11, 1818, had enacted a statute providing, in part, as follows:

*“Be it enacted by the General Assembly of Maryland, That if any Bank has established, or shall without authority from the State first had and obtained, establish any branch, office of discount and deposit or office of pay and receipt, in any part of*

this State, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes in any manner, of any other denominations than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; *Provided always*, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the Treasurer of the Western Shore, for the use of the State, the sum of fifteen thousand dollars."

It will be perceived that this Maryland tax was not a tax on corporations, as such, or on corporate franchises. It applied to all banks and branches of banks, whether corporations, partnerships or individual bankers, carrying on the business of banking within the State of Maryland without having received permission from the State. It was, therefore, a tax on the doing of a banking business to the extent that such business involved the issuing of notes.

There was then in existence the Bank of the United States, chartered by an Act of Congress, and having a branch in the State of Maryland. The Bank of the

United States contested the question of its liability to this tax and brought the case to this Court. Before this Court the argument of Mr. Webster, Mr. Pinkney and the Attorney General of the United States in behalf of the bank, the argument of Mr. Hopkins, Mr. Jones and the Attorney General of Maryland in behalf of the State of Maryland and the opinion of this Court by the Chief Justice dwelt on two main points: first, the power of the United States to incorporate the bank and, second, the power of the State of Maryland to impose the tax on the bank. It is the second point which particularly touches the case at bar.

The Supreme Court held that Congress, for the convenient exercise of the constitutional powers of the Government, might charter a bank and that such bank, being an instrumentality of government, could not be taxed in respect to its operations by one of the States. The substance of the decision is best summarized by Chief Justice MARSHALL himself, in his later opinion in *Osborn v. United States Bank*, 9 Wheaton 738, where he said in speaking of the earlier case at page 859:

“The foundation of the argument in favor of the right of a state to tax the bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its

being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch vs. State of Maryland*, 4 W. 316, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' "

Returning to the report of the case of *McCulloch v. Maryland*, we quote from the opinion of the Court. Chief Justice MARSHALL said:

"That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." (Page 425.)

"On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations." (Page 426.)

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body

by the people of the United States? We think it demonstrable, that it does not." \* \* \* "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union." (Page 429.)

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*." (Page 431.)

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government." (Page 432.)

"\* \* \* the power of taxation in the general and state governments is acknowledged to be concurrent." (Page 435.)

From these quotations we draw the principle of our argument: that a State tax so far as it invades the constitutional powers and sovereignty of the United States is void and that a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. It is quite independent of and perfectly consistent with the rule of supremacy of Federal laws made within the constitutional scope of the general Government.

It has been intimated that the opinion in *McCulloch v. Maryland* furnishes, in the quotation which follows, a ground of distinction between the Maryland tax on the United States Bank and the corporation tax on State corporations. The opinion says at pages 435-6:

“It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always



exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But immediately thereafter the opinion says:

"But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States."

But both of these last quotations must be read in the light of the case then before the Court. The Maryland tax, as we have pointed out, was not a corporation tax. It was not a franchise tax. It was a tax on the business of banking. Hence the tax, if permitted to be levied on the business of the United States Bank, would have been a burden on an agency of the Federal Government and a burden on the Government's constitutional powers exercised through constitutional means. The State banks, as Mr. Pinkney pointed out (p. 398), were not fiscal agencies of the States creating them and of course could be taxed by the United States by a general tax on the banking business. Moreover, the Court was dealing with a case where total exemption from all State taxation on the business of the bank could properly be claimed. We are claiming no such exemption. The business of the defendant corporation in the case at bar is a purely private business like that described in the quotation from *Osborn v. U. S. Bank* (*supra*), and can be taxed by any Federal excise law which affects all persons and corporations doing a mercantile business and which is, therefore, not a fran-

chise tax. But the Court never meant to suggest that a Federal tax on banks, falling solely on those which had been incorporated, could be sustained under the general power to tax. Such a tax would not have been "*safe for the States, and safe for the Union,*" because it would have invaded the power of the States—not in respect to an instrumentality or agency of government but in respect to a high prerogative of State sovereignty, to grant corporate charters. The Judge who said that a State could not tax a patent granted by the United States could not have believed that the United States could tax a charter granted by a State. The Judge who said twice in the same opinion that the taxing powers of the States and the United States were concurrent (pp. 425, 435) would not have decided that a State franchise could be taxed by Congress while a United States patent could not be taxed by a State.

Although the illustration of the operation of the whole upon the part as distinguished from the operation of the part upon the whole, caught from Mr. Pinkney's argument (p. 398), bears first blush plausibility as a sketch of our duality of sovereignty, it has not controlled this Court in a single case that we have been able to find where the suggestion has been made that while the States may not burden by tax the constitutional powers of the United States the Federal Government is free to tax the reserved powers of the States. The learned Justice who made the suggestion in *The Collector v. Day*, 11 Wallace, 113 at p. 128, was in a minority of one. It was repudiated by the majority opinion in that case and we have not seen it since in any reported case except one other dissenting

opinion by the same Justice. If it were controlling, the line of decisions declaring the public securities of the States and their municipalities to be beyond the reach of Federal taxation would never have been made.

The case of *Osborn v. United States Bank*, 9 Wheaton, 738 (1824), we have already alluded to. It involved the right of the State of Ohio to tax the Bank of the United States for operating in that State. The case follows *McCulloch v. Maryland* and decided that the bank was not subject to a tax under the Ohio statute of February 8, 1819, which provided specifically that if the Bank of the United States or any other should continue to transact business in the State it should be liable to an annual tax of fifty thousand dollars on each office of discount and deposit.

The rule of *McCulloch v. Maryland* and *Osborn v. United States Bank* was also applied to the institutions chartered under the National Banking Act and protects their business from State taxation except so far as their shares may be taxed in the hands of their stockholders by express consent of Congress.

The first case of conflict of power between a State and the United States with respect to taxing public securities arose in *Weston v. The City Council of Charleston*, 2 Peters, 449 (1829), when a municipal ordinance of Charleston, South Carolina, provided an income tax on "all personal estate, consisting of bonds, notes, insurance stock, *six and seven per cent. stock of the United States* \* \* \*, twenty-five cents upon every hundred dollars." This Court held that such a tax on the Government stock

was void as a burden on the Government's power to borrow.

Chief Justice MARSHALL, referring to *McCulloch v. Maryland*, said at page 468:

"The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

The tax was held unconstitutional.

A case similar to the last came to this Court from New York, where the City of New York had included in an assessment against the capital of the Bank of Commerce its holdings of Government bonds. That was the case of *Bank of Commerce v. New York City*, 2 Black, 620 (1862). The decision, following the *Weston case*, held the assessment void, and the opinion by Mr. Justice NELSON, speaking for the entire Court, is so clear in the enunciation of a principle that is vital in the case at bar that we quote from it at some length:

"The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power." (Page 633.)

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"The conclusive answer to the attempted exercise of the State authority in all these cases is, that the exercise is in derogation of the powers granted to the General Government, within which, it is admitted, it is supreme. That Government whose powers, executive, legislative or judicial, whether it is a Government of enumerated powers like this one, or not, are subject to the control of another distinct Government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the Government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another Government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that Government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other Government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true in respect to every other power or function of a Government subject to the control of another." (Pages 633-4.)

After quoting from Chief Justice MARSHALL's rule which is "safe for the States and safe for the Union" Mr. Justice NELSON thus concludes on page 635:

"Each is sovereign and independent in its sphere of action and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

In the case of *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435 (1842), it appears by the agreed statement of facts that Captain Daniel Dobbins of the United States revenue cutter Erie had been assessed by the commissioners of Erie, Pennsylvania, for county taxes upon his office as commander of the cutter for the years 1835 to 1837 in the sum of ten dollars and seventy-five cents. It was argued in this Court that the assessment was invalid since it was on an office of the Government. This Court, by Mr. Justice WAYNE, held the assessment void on the authority of *McCulloch v. Maryland* and *Weston v. City Council of Charleston* (both of which we have referred to), as a State tax on the constitutional means employed by the Government of the United States to execute its constitutional powers.

### C.

#### FEDERAL TAXATION OF STATE INSTRUMENTALITIES.

Up to this point we have mentioned no case in which the taxing power of the United States has been checked for trenching upon the sovereignty of a State and although no such case seems to have come before this Court prior to 1870, expressions frequently appeared in the opinions of the Court which naturally led up to the conclusion that an invasion of State sovereignty through Federal taxation must be checked for precisely the same reason that invasion of the United States sovereignty through State taxation must be checked. Some of these expressions follow:

In *Worcester v. Georgia*, 6 Peters, 515 (1832) Mr. Justice McLEAN, said at page 570:

“The powers exclusively given to the Federal Government are limitations upon the State authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the General Government, than the action of the State Governments can arrest or obstruct the course of National power.”

In *Ableman v. Booth*, 21 Howard, 506 (1858), Chief Justice TANEY, speaking for the entire Court, said at page 516:

“The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.” \* \* \*

“ ‘this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State.’ The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution.” (Page 519.)

In the *License Tax Cases*, 5 Wallace, 462 (1866), Chief Justice CHASE, speaking for the entire Court, said at page 470:

“But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress

has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

In *Pervear v. The Commonwealth*, 5 Wallace, 475 (1866), Chief Justice CHASE, speaking for the entire Court, said at page 479:

"But the defence set up in the case before us is a very different one. \* \* \* \* It is founded on the general power to levy and collect taxes, *admitted on all hands to be concurrent only with the same general power in the State governments; \* \* \**"

In the year 1870, the case of *The Collector v. Day*, 11 Wallace, 113, came before this Court presenting practically the converse of the case of *Dobbins v. Commissioners of Erie County* (*supra*). The facts were as follows:

For the years 1866 and 1867 Joseph M. Day, Probate Judge for Barnstable County, Massachusetts, was assessed for the Federal income tax upon his salary as such judge. He paid under protest the tax for those two years, amounting to \$61.50, and brought suit against the Collector of Internal Revenue to recover back the same. The case was argued on an agreed statement of facts in the Circuit Court of the United States for the District of Massachusetts, at October term, 1869, before Mr. Justice CLIFFORD and Judge JOHN LOWELL.

The question before the Circuit Court in Massachusetts was whether the principle of the cases heretofore cited in this brief applied to Federal taxation.



From the opinion of Mr. Justice CLIFFORD (reported in 3 Clifford, 376), we discover how he disposed of the argument in favor of the right of the United States to tax the salary of the State judge and applied the principles of *McCulloch v. Maryland*. He said at page 388:

“Federal officers and the instruments and means of the Federal government, it is conceded, are exempt from State taxation, but it is denied that the Federal government is subject to any such implied prohibition, even in the case before the Court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the States which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties.”

“The proposition of the defendant is in substance and effect that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution,

nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." (Page 389.)

"Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. *Fifield v. Close*, 15 Mich., 505; *Warren v. Paul*, 22 Ind., 279; *Jones v. Keep*, 19 Wis., 369; *Union Bank v. Hill*, 3 Cald. (Tenn.), 325.

"Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, 'separate and distinct sovereignties, acting separately and independently of each other within their respective spheres,' just as fully 'as if the line of division was traced by landmarks and monuments visible to the eye.' *Ableman v. Booth*, 21 How., 516; *McCulloch v. Maryland*, 4

Wheat., 429; *Austin v. The Aldermen*, 7 Wall., 699.

"Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create." (Pages 393-4.)

The case came before this Court on the appeal of the Collector of Internal Revenue, at December term, 1870, and was argued by the Attorney General of the United States on behalf of the appellant. (11 Wallace, 113.)

The opinion of this Court by Mr. Justice NELSON, after asserting that the rule of *McCulloch v. Maryland* and *Dobbins v. The Commissioners of Erie* must apply, says at page 124:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers

which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.

"The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County v. Oregon* (7 Wall. 76). 'Both the States and the United States,' he observed, 'existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved.' Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

"Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our

complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws."

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, \* \* \* ." (Page 126.)

The case of *The Collector v. Day*, remains the law and fully sustains the principle which we stated in the first part of this brief, viz: that a State tax, so far as it invades the constitutional powers and sovereignty of the United States, is void and that a Federal tax, so far as it invades the reserved powers and sovereignty of the States is equally void.

The principle is stated in *Railroad Company v. Peniston*, 18 Wallace, 5 (1873), in the following language at page 30:

"There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of

the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is legitimately exercised within the States. While it is true *that* government cannot exercise its powers of taxation so as to destroy the State Governments, *or embarrass their lawful action*, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government."

This principle was applied in the case of *United States v. Railroad Company*, 17 Wallace, 322 (1872). In that case it appeared that the city of Baltimore in the year 1854 had loaned to the Baltimore and Ohio Railroad Company \$4,500,000 to aid in the construction of the railroad. By section 122 of the Internal Revenue Act of 1864, as amended in 1866, it was provided that railroads (and various other companies) should pay out of earnings five per cent. on interest or coupons, dividends, etc. Under this law the United States demanded five per cent. out of the interest payable to the City of Baltimore on its loan. This Court, affirming the decision of the Court below, held that this tax could not lawfully be imposed on the City of Baltimore. By Mr. Justice HUNT the Court said at page 327:

"The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

"There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right

of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

The principle has also been applied to exempt municipal bonds from Federal taxation. In *Mercantile Bank v. New York*, 121 U. S., 138 (1886), Mr. Justice MATTHEWS said at page 162:

"Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, \* \* \*."

The same principle made the income of municipal bonds free from the income tax of 1894.

*Pollock v. Farmers' Loan and Trust Company*, 157 U. S., 429 (1895), at pages 583-586, 601-603, 652, 653-4.

And in the case of *Plummer v. Coler*, 178 U. S., 115, (1900), these last cases are cited and quoted in such manner as to show beyond all doubt that this Court now regards as completely reciprocal this restraint upon the general Government and the States. In that case Mr. Justice SHIRAS said at page 117:

"It is not open to question that a State cannot, in the exercise of the power of taxation, tax obliga-

tions of the United States. *Weston vs. Charleston*, 2 Pet., 449; *Bank of Commerce vs. New York City*, 2 Black, 620; *Home Insurance Co. vs. New York*, 134 U. S., 594, 598.

"So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank vs. New York*, 121 U. S., 138; *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 583.

"The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice Nelson in *Collector vs. Day*, 11 Wall., 113, 124: 'The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States;' and, as was said by Mr. Chief Justice Fuller, in *Pollock vs. Farmers' Loan & Trust Company*, 157 U. S., 537: 'As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.'"

#### D.

#### OTHER CASES OF INVASION OF SOVEREIGNTY THROUGH TAXATION.

Lands owned by the United States are exempt from State taxes, as was held by this Court in *Van Brocklin v. Tennessee*, 117 U. S., 151 (1886). And in *Ambrosini v. United States*, 187 U. S., 1 (1902), it was held that



the stamp tax required by the War Revenue Act of the United States of 1898 could not be imposed upon a bond required by the State of Illinois as a condition to the granting of a license to sell intoxicating liquors. In that case this Court, speaking by Chief Justice FULLER, said at page 7:

“The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assume the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental.”

The opinion in the case last cited refers to a number of decisions as authority, among them *Bettman v. Warwick*, 108 Fed. Rep., 46, decided by the United States Circuit Court of Appeals for the Sixth Circuit. In that case it was held that it was not within the power of Congress to require a revenue stamp to be put on a bond given by a notary public as a condition to his appointment to office by a State. The opinion by Mr. Justice LURTON, then Circuit Judge, concurred in by Mr. Justice DAY, then Circuit Judge, and by Judge SEVERENS, completely upholds the mutuality of the restraints upon the taxing powers of the National and State governments against invading the sovereignty of each other.

## E.

## STATE TAXATION OF UNITED STATES PATENTS.

We next take up the subject of patents, the right to create and preserve which is vested by the Constitution in the United States. Patents had their origin in royal grants as a part of the prerogative of the crown (1 Robinson on Patents, Sections 1, 10), and before the adoption of the Constitution were and still may be granted by the several States out of their own sovereignty (Chancellor KENT, in *Livingston v. Van Ingen*, 9 Johnson, 507 (1812), at pages 528, 530-1). In *McCulloch v. Maryland* Chief Justice MARSHALL, in a part of the opinion already quoted, scouted the idea that a State might tax a patent-right granted by the general Government. He classed it with the mint and the custom house. It has been assumed in later decisions of this Court that a Federal patent-right could not be taxed by a State.

*Patterson v. Kentucky*, 97 U. S., 501 (1878).

*Webber v. Virginia*, 103 U. S., 344 (1880).

*Allen v. Riley*, 203 U. S., 347 (1906).

In other courts the point has been expressly adjudicated.

*In re Sheffield*, 64 Fed. Rep., 833 (1894).

*Commonwealth v. Westinghouse Mfg. Co.*, 151 Pa. St., 265 (1892).

*The People ex rel. Edison Co. v. Board of Assessors*, 156 N. Y., 417 (1898).

And the decisions are placed, not on the ground that the making of the patented article or the vending of the patented article, or that the patented article itself is a means, instrumentality or agency of the United States,

but on the ground that the article derived its right to be a patented article from a grant or franchise from the United States. A patent is a franchise. The words of Chief Justice TANEY, in delivering the opinion of this Court in *Bloomer v. McQuewan*, 14 Howard, 539 (1852), make our meaning clear. He said at page 549 :

“The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly and that monopoly is derived from, and exercised under, the protection of the United States.”

Of course, by the Federal franchise of the letters patent the patentee gets no new right to make or vend the article embodying his invention. That right he has before the patent is applied for or granted. It is his natural right. As this Court, by Mr. Justice HARLAN, said in *Patterson v. Kentucky (supra)* at page 506 :

“The right to sell the Aurora oil was not derived from the letters patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery.”

It has therefore always been held that the mere fact that articles had been patented by a United States patent did not prevent the States from including the sale of such articles in their ordinary police or license regulations. That was the decision in the case last cited and also in the case of *Webber v. Virginia (supra)*, and other cases following it.

It has been suggested that taxing a Federal patent differs from taxing a State corporate franchise, because the States granted to the Federal Government the power to issue patents, and therefore may not destroy the value of that grant by taxing the patents, while, on the other hand, the States retained their right to grant corporate franchises but subject to the general power of taxation which they had conferred on the Government. That is a perverted argument. It involves a breach of faith with the States and a violation of the compact under which the union was formed, and amounts to saying that what the States granted to the general Government belongs to the latter by express grant, while what was reserved by the States may be wrested from them by the general Government through the power to tax.

The exemption of Federal patent-rights from State taxation has a very significant bearing on this case. Suppose, for example, that the State of Vermont should enact a law providing that every person, firm or corporation owning any United States letters-patent should pay a tax with respect to the carrying on or doing of any business protected by such letters-patent equivalent to one per cent. of the net income of such business. The State of Vermont would attempt to defend the statute on the ground that the State had the right to classify for purposes of taxation; that it had selected as a class certain favored persons and corporations who enjoyed Government monopolies; that the class so selected was, by reason of their monopolies, well able to pay and that the tax was light. On behalf of the Government it would be answered that the power to grant patents was a constitutional power of the United States;

that a tax upon a Federal patent was a tax upon a franchise granted by the United States out of its sovereignty, and therefore a tax upon a constitutional power of the general government and an invasion of its sovereignty, and that though the tax was light, the power to tax at all, if once admitted, would involve in the assessment of a heavier tax the power to destroy and to render useless the power to create.

There can be little doubt as to how this Court would decide such a case. We think there should be as little doubt if the conditions were reversed and the Court had before it the case of a Federal tax upon a State patent or State corporate franchise.

#### F.

#### STATE TAXATION OF A FEDERAL CORPORATE FRANCHISE.

We now pass to another sort of franchise—the franchise to be a corporation and to act in a corporate capacity. Like the franchise of letters-patent, it comes to the citizen or subject as a crown prerogative or a prerogative of sovereignty. “The king has also the prerogative of conferring “ privileges upon private persons. \* \* \* Such also is the “ prerogative of erecting corporations; whereby a num- “ ber of private persons are united and knit together, and “ enjoy many liberties, powers and immunities in their “ politic capacity which they were utterly incapable of in “ their natural.” (1 Bl. Com., Ch. 7, pp. 272–3.) “The “ king’s consent is absolutely necessary to the erec- “ tion of any corporation, either impliedly or expressly “ given. \* \* \* The methods, by which the king’s “ consent is expressly given, are either by act of parlia-

“ment or charter.” (1 Bl. Com., Ch. 18, 472-3.) “Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the king’s prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king’s grant; \* \* \*. The kinds of them are various, \* \* \*. It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts: \* \* \*.” (2 Bl. Com., Ch. 3, p. 37.)

“Franchises,” said Chief-Justice TANEY in *Bank of Augusta v. Earle*, 13 Peters, 519 (1839) at page 595, “are special privileges conferred by Government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State.”

In view of the settled law that a State might not tax the franchise of letters patent granted by the United States, and in view of the fact that corporate franchises, like patent franchises, are granted out of sovereignty, it was inevitable that this Court should unanimously hold, when the great case of *California v. Central Pacific Railroad*, 127 U. S., 1, came before it, that the States were utterly without power to tax a corporate franchise granted by the United States. Defenders of the “corporation tax” have sought to lessen the scope of Mr. Justice BRADLEY’s great opinion in that case by saying that it

turned on the fact that the railroad was a Federal agency and not on the fact that the tax was laid on a Federal franchise. There is no justification for this. There is not a line or a word in the whole opinion that gives color to that statement. The entire decision was placed upon the ground that the franchise "emanates from, and is a portion of, the government that confers it. To tax it, is not only derogatory to the dignity, but "subversive of the powers of the government and repugnant to its paramount sovereignty." (p. 41 :) Justice BRADLEY did mention the public or national utility of the corporation, but the mention of that feature was quite subordinate to the main issue, and beside the real question of the power of the State to tax the franchise. Long before that case came before this Court it had been recognized that every great transcontinental railroad performed Government service in the transportation of mails, troops, etc., and was an instrumentality, to that extent, of the United States, and in establishing the fact that such a railroad was an instrumentality of the United States, it made not the slightest difference whether the railroad was chartered by the United States or one of the States. It would have been, therefore, a sheer waste of time for this Court to have pointed out in *California v. Central Pacific Railroad* that the railroad had been chartered by the United States if the Court regarded the railroad as an instrumentality of the United States like the Bank of the United States, the National banks, the Government stocks and the captain of the revenue cutter.

We have said that it was recognized that all transcontinental railroads were carrying troops, mails, etc., and were,

to that extent, instrumentalities of the United States, and that it made no difference as to the power of the State to tax the property of such railroads whether they were incorporated by the United States or by a State. In support of this we quote from the opinion of this Court in *Railroad Company v. Peniston*, 18 Wallace, 5. Mr. Justice STRONG said at pages 33, 34:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad." \* \* \*

"It is, however, insisted that the case of *Thompson vs. The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch vs. The State of Maryland*. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in *Weston vs. Charles-*



lon, they cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature."

Mr. Justice STRONG, however, was careful to point out that the tax there under consideration was "*not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being.*" The same rule had been followed in *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530 (1888), in which Mr. Justice MILLER incidentally pointed out (p.549) that all railroads had been declared to be government post-roads. When, therefore, the case of *California v. Central Pacific Railroad*, 127 U. S., 1, came before this Court, it was settled law that property taxes on railroads employed as Federal agencies could be levied by the States irrespective of whether such railroads were chartered by the United States or by the States and the only questions before the Court were whether the State tax in that case was laid on a Federal franchise and, if so, whether it could be lawfully laid. It appeared by Article XIII, section 10 of the constitution of California, that "the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization \* \* \* \*." This language was followed by the legislature of California in framing section 3628 of the Political Code. The Central Pacific Railroad Company claimed that the State Board of Equalization had included

in assessments against the company the value of the franchise or franchises granted to it by the United States and expressly alleged it was a Federal corporation holding its corporate power and franchises under the government of the United States. The Court below found that the assessment did include "the full value of *all* franchises and corporate powers exercised by the defendant."

Mr. Justice BRADLEY, after stating the Acts of Congress which related to the building of the Central Pacific Railroad or its predecessor, found that the Company possessed franchises granted by Congress. He thus disposed of the question whether the State may tax them: (Pages 40-1.)

"Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise. Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always reduced by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed

or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch vs. Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

The foregoing extract from Mr. Justice BRADLEY's opinion was quoted in full and with approval by this Court in the case of *Central Pacific Railroad v. California*, 162 U. S., 91 (1896) at pages 184-5, and it would seem to be settled law that a State cannot tax a franchise granted by the General Government.

## FEDERAL TAXATION OF A STATE CORPORATE FRANCHISE.

We now pass to the precise question before this Court in the case at bar: May Congress impose a tax on a corporate franchise granted by a State?

We have shown that the granting of charters and franchises to corporations is a prerogative of the crown. Being such, it is owned by the States, as this Court, speaking by Mr. Justice McLEAN, said in the case of *Wheeler v. Smith*, 9 Howard, 55, 78 (1850):

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government."

Let us now consider some of the cases which may be cited on the side of the corporation tax. First is the case of *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869). A dictum in *Veazie Bank v. Fenno* is the only authority referred to in the Senate debates as upholding the novel principle of this extraordinary tax. The decision in that case went upon the ground that to the United States belongs complete control over currency.

The *Veazie Bank* was a Maine corporation and had authority to issue bank notes for circulation. The Act of Congress of July 13, 1866, provided that

"Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

The bank claimed that this law was unconstitutional on two grounds. The second ground was that "the act imposing the tax impairs a franchise granted by the State and Congress has no power to pass any law with that intent or effect" (Page 540); and the Court says at page 547:

"Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

Consider the statute there before the Court. It was not a corporation tax. It was not aimed at corporations or payable by them because they were such. It included among those liable to pay the tax all banks—partnerships as well as incorporated companies (14 Op. A. G. 373)—and it was not levied on the banks or bankers in respect to their business as a whole or their franchise, right or privilege to do business. It was levied on property and affected a single thing that all banks and bankers had been accustomed to do, viz., to issue notes for circu-

lation, whether such notes were the banker's own or those of some other person or bank. This feature was perfectly understood by the Court and was dwelt upon, for Chief Justice CHASE said at page 547:

"But in the case before us the object of taxation is *not the franchise* of the bank, *but property created, or contracts made and issued under the franchise, or power to issue bills*. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts."

And on pages 546-7:

"The tax under consideration is a tax on bank circulation."

The dissenting Justices, Mr. Justice NELSON and Mr. Justice DAVIS considered that this tax upon bank circulation was equivalent to a tax on the reserved power of the States to create banks and therefore unconstitutional, and Mr. Justice NELSON said at page 555:

"As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them."

And on page 556:

"It is true, that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies, and others.

"This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and, within these limits, sustained and supported them as sovereign States."

These quotations, involving principles which we now urge, were not, we submit, denied by the majority of the Court in *Veazie Bank v. Fenno*. The majority opinion expressly states that the tax was not on the franchise of the bank and admits that there may be cases in which a tax on a franchise granted by a State must be held unconstitutional, and that the reserved power of the States to pass laws *and to give effect to them through executive action* is beyond the reach of Federal taxation. That concession comes very nearly covering, if not quite covering, the case at bar. Surely the assertion that the Court cannot admit "that franchises granted by a State are necessarily exempt from taxation" does not necessarily include the franchise to erect a corporation through the exercise of a crown prerogative. It may well be that such a franchise as the right of an individual or a firm or

corporation to issue circulating notes as currency may not be exempt from Federal taxation any more than the right to buy and sell on the floor of an exchange or the right to transmit an estate by will or to take title under a will; but when the Court expressly states that the tax is not upon the franchise of the bank, i. e. the franchise to be a corporation and to act in a corporate capacity, we insist that no legitimate use of the case can be made as a precedent for the validity of the corporation tax of 1909.

The latter part of the opinion of the Court in *Veazie Bank v. Fenno* shows that the statute there under discussion may be sustained on the strength of the Government's power to regulate currency. That this is probably regarded as the true ground of the decision may be gathered from the opinion of this Court in the *Head Money Cases*, 112 U. S. 580 (1884), where Mr. Justice MILLER, speaking for the entire Court, said at page 596:

"In the case of *Veazie Bank v. Fenno*, 8 Wall., 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

So far as we have been able to ascertain, the case of *Veazie Bank v. Fenno* has never been referred to by this Court as sustaining the power of the United States to tax a State franchise to be a corporation.



It has been suggested that section 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909 and the decision of *Railroad Company v. Collector*, 100 U. S. 595 (1879) is referred to as sustaining the tax which was to be paid by "any railroad, canal, turnpike, canal navigation or slack water company." It is true that individuals and partnerships were not mentioned by name in that section, but it is also the fact that the word "corporation" is not used. The Court seemed to think the tax an ordinary occupation tax on particular businesses.

The case of *Railroad Company v. The Collector*, is not a precedent for the corporation tax of 1909. The statute there in question (Section 122 of the Internal Revenue Act of 1864, as amended in 1866) provided that the companies named must deduct from the payment on account of interest on bonds and of dividends on stock a tax on such interest and dividends, and the single question presented to this Court was whether this tax could be collected when the bondholders and stockholders were aliens. None of the constitutional questions arising in the case at bar were mentioned or even suspected of being involved in *Railroad Company v. The Collector*. That the case is of no value in the present discussion appears from the first paragraph of the opinion where Mr. Justice MILLER says at p. 596:

"As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, *the case is of little consequence as regards any principle involved in it as a rule of future action.*"

It is also important to notice that this Court in the case of *United States v. Railroad Company*, 17 Wall., 322, held

that the tax imposed by the law under consideration in *Railroad Company v. The Collector*, 100 U. S., 595, was not a tax upon the corporation. In the headnote of the case it is said that:

“The tax provided for in the 122nd Section of the Internal Revenue Act of June 30th, 1864, as subsequently amended \* \* \* is a tax upon the creditor and not upon the corporation. The corporation is made use of, but as a convenient means, of collecting the tax.”

It is not clear whether the construction of this statute of 1864 entertained by this Court in the case in *Wallace* is to prevail or the subsequent construction in the case decided in 100 U. S., but it is interesting to note that the subsequent case of *Railroad Company v. The Collector*, 100 U. S., 595, makes no mention in the opinion of the prior case of *United States v. Railroad Company*, 17 Wall., 322.

Another case which has been thought pertinent by supporters of the corporation tax is *Nicol v. Ames*, 173 U. S. 509 (1899), where this Court upheld that provision of the War Revenue Act of 1898 requiring a memorandum of every sale at any exchange or board of trade or other similar place and the affixing of a revenue stamp to such memorandum. The Court, after holding that such tax was not a direct tax, held that sales of that sort could be classified by themselves and apart from other sales and could therefore properly be selected for a special tax because of the obvious and peculiar privilege and facility of making a sale at a place where there was the best opportunity for a demand, a price, and dispatch in the transaction of business. It was conceded, however, that the

privileges and facilities of exchanges were not created by the State, and, therefore, were not, in any sense, franchises created out of a crown prerogative. And in the opinion of the Court in *Nicol v. Ames*, Mr. Justice PECKHAM suggestively said at page 521 :

“If it were to be assumed that taxes upon *corporate* franchises or privileges may be imposed only by the authority that created them, it does not follow that *no* privilege or facility can be taxed which is not created by the government of a State or by Congress.”

We may therefore dismiss *Nicol v. Ames* as an authority in support of the corporation tax.

We shall next proceed to discuss the acknowledged power of Congress to tax the transmission of property under the State laws of wills and intestacy. The recognition of this power has been referred to as an argument to support a Federal tax on corporate franchises. The error arises from a failure to distinguish between the origin, ownership, transmission and receipt of property, on the one hand, and the creation of a corporation on the other.

Blackstone's chapter “of Property in General” (2 Bl. Com. Ch. I, p. 1) gives the origin of property. In the beginning all things were in common and the only property which an individual had therein was a kind of a transient property which, while he used the particular thing, was his by “the law of nature and reason.” (*Id.*, p. 3.) When he left it, the thing became transiently the property of the next taker. “As mankind increased in numbers, craft and ambition it became necessary, in order to avoid innumerable tumults, to entertain the concep-

tion of more permanent dominion over things." (*Id.*, p. 4.)

"And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant: which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." (*Id.*, p. 5.)

"And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property to the *substance* of the earth itself; which excludes every one else but the owner from the use of it." (*Id.*, p. 8.)

"Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; \* \* \* " (*Id.*, p. 9.)

Then mutual convenience introduced commercial traffic and transfer of property.

On the death of a person his property became that of the next immediate occupant, but for the peace of mankind "the universal law of almost every nation" has given to the dying person the right of disposing of his property by will, or, in case he makes no will, has declared who shall be his heir or successor (*Id.*, p. 10).

The right of children to inherit seems to have been

recognized earlier than the right to make a will (*Id.*, p. 11), and the origin of their right to inherit seems probably to have arisen from their being naturally the persons who would be near their father's death-bed and therefore the next immediate occupants of his possessions (*Id.*, 11-12). In default of children a man's servants born under his roof become his heirs (*Id.*, p. 12). But the strict rule of inheritance made heirs disobedient and headstrong, defrauded creditors and sometimes prevented the wisest provision for the support of children. This caused the introduction of wills (*Id.*, p. 12).

In *United States v. Perkins*, 163 U. S., 625 (1876), this Court, by Mr. Justice BROWN, said at page 628:

"\* \* \* the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, \* \* \*."

And in *Windham v. Chetwynd*, 1 Burr., 414 (1757), LORD MANSFIELD said at page 419:

"Let me observe that the power of devising ought to be favored.

"It is a natural consequence of property, and the right a man has over his own."

The foregoing citations are sufficient to show that property does not proceed from a sovereign power, nor is it created out of a crown prerogative. It is enjoyed by persons as a natural right. The rights of disposing of it by will and inheriting it are also spoken of as natural rights, though provided for and regulated by laws just as are the owning, sale and purchase of property. The State may say that the provisions of a man's will shall be respected and the State may say who are the heirs, but the State

does not create the property which is transmitted. The transmission is occasioned by death and is not created by the State. The transmission would have occurred without any laws for wills or inheritances and the property would have gone by the old doctrine of occupancy to the first takers. There has never been any theory that upon a man's death his property dissolves, is absorbed by sovereignty and is re-created by sovereignty and vested in somebody else.

If it were maintained that the transmission of a decedent's property was beyond the reach of Federal taxes because regulated by State laws it would follow that property generally, since it is regulated in its ownership, use, sale, exchange and purchase by State laws, must also be beyond the reach of such taxes. This was the view taken by this Court in *Knowlton v. Moore*, 178 U. S. 41 (1900), and the subject was thus disposed of by Mr. Justice WHITE at page 59:

"But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and

also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus, imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

It is therefore held that the transmission of property through the death of its former owner, like the owning, buying and selling of property, is alike within the taxing power of the United States though within State regulation. It brings the transmission of a decedent's property to the same basis as the circulation of negotiable notes as currency, the selling of property, the trafficking in

commodities at exchanges and boards of trade and all other privileges or rights which, though exercised under the permission and regulation of the States, may still be taxable by the United States. There is a perfectly clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create and a Federal tax on a corporate franchise created and granted out of State sovereignty.

In *Thomas v. United States*, 192 U. S., 363 (1904) the plaintiff in error had been indicted for omitting to stamp a memorandum of sale of some railroad stock as required by the War Revenue Act of 1898. He was convicted and appealed to this Court. The argument in this Court and the decision turned solely upon the question whether the requirement of affixing to the memorandum a revenue stamp imposed a "direct tax." This Court held that the tax was not a direct tax but an excise tax upon the sale, and the Court by the Chief Justice said at page 371 :

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates."

The case is, therefore, brought within the principle of the other cases where taxes have been imposed on the opportunity or privilege of doing some particular thing with or in respect to property such as issuing negotiable notes as currency, selling at exchanges or boards of trade, transmitting by will or through intestacy, etc. It was not argued and could not have been argued that the tax was a tax on a corporate franchise and the tax was not even limited to shares in corporations but included shares in "any



association, company or corporation." Therefore every enterprise or property where separate interests were represented by shares was affected alike.

There is nothing in the case of *Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397 (1904), which supports the constitutionality of the corporation tax. That case arose under section 27 of the War Revenue Act of 1898, which provided "that *every person, firm, corporation or company* carrying on or doing the business of \* \* \* \* refining sugar" should pay an annual excise tax equivalent to a certain per cent. of the gross receipts. The tax was an ordinary occupation tax and the statute imposing it named the occupations taxed and imposed the tax on all persons engaged in such occupations. It was argued that the tax was a direct tax on income. This Court held it to be an excise tax on a particular business and quite in line with *Pacific Insurance Co. v. Soule*, 7 Wallace, 433. The corporation tax law lays no tax on any particular business except insurance.

In *South Carolina v. United States*, 199 U. S., 437 (1905), it was held that the State dispensaries of South Carolina, although established by the laws of that State and authorized by the State as the sole dispensers of intoxicating liquors, must pay the internal revenue taxes imposed by the United States on liquor dealers. While not referred to in the opinion of the Court, the case of *Bank of the United States v. Planters' Bank*, 9 Wheaton, 904 (1824), was cited on the argument by the Solicitor General of the United States. In that case Chief Justice MARSHALL said at page 907:

"It is, we think, a sound principle, that when

a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted."

This reasoning seems very near that of the Court in the *South Carolina case*, for Mr. Justice BREWER says at page 463:

"It is reasonable to hold that while the former [*i.e.*, the United States] may do nothing by taxation in any form to prevent the full discharge by the latter [*i.e.*, a State] of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation."

Suggesting a similar line of thought Mr. Justice BREWER also said in the *South Carolina Case* at page 461:

"These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

By "these decisions" the Court meant the *Veazie Bank Case*, *The Collector v. Day*, *United States v. Railroad Company* and the *Ambrosini Case*, all of which have been discussed in this brief. Those cases are the only ones which the Court had immediately referred to in that connection. There is, therefore, no reason to suppose that the language of Mr. Justice BREWER was

intended in any way to affect the rule exempting United States letters patent or United States corporate franchises from State taxation. That being so, the *South Carolina Case* expressly omits to touch the cases which are especially in point in the case at bar. Moreover, if we take the words of the Court "of a strictly governmental character" we would assume that they would as aptly fit the function of creating a corporation out of a crown prerogative as they would the appointment and payment of a judicial officer, the borrowing of money for public purposes, or the taking of a bond under the police power. The exercise of the crown prerogative in creating corporations is, we take it, one of the "ordinary functions" of State government, and we gather from the opinion of the Court that such functions are not to be trenched upon by Federal taxation. For the Court says at page 451:

"But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. \* \* \*

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the *ordinary functions* of government, \* \* \*."

And as Mr. Justice BROWN, speaking for this Court in *Hale v. Henkel*, 201 U. S., 43, said at page 74:

"The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public."

But there is a further and very wide distinction between the *South Carolina Case* and the corporation tax on the Stone Tracy Company.

The tax was laid on the South Carolina dispensaries not because they were empowered by the State, but because

they dealt in liquors. The corporation tax law falls upon the Stone Tracy Company because it is empowered by the State and not because it does a general mercantile business. In the South Carolina case the tax is not upon the power of South Carolina to create the State dispensaries. In the case at bar the tax is upon the power of Vermont to grant and preserve a franchise to the defendant corporation. If, through lax enforcement of the South Carolina liquor laws, persons other than State agents sell liquor in South Carolina, such persons are required to pay the United States liquor taxes. On the other hand, in Vermont, individuals and partnerships engaged in the same business as the Stone Tracy Company are not subject to the corporation tax because they are not chartered by Vermont. We have but to refer to the official report in the *South Carolina Case* to find that in spite of the State statute confining the sale of liquors to the State dispensaries, the United States liquor taxes were collected from two hundred and sixty private dealers in the State. It is therefore clear that the two cases are not parallel, and that the principle of the *South Carolina Case* is merely that a State, by entering the field of private business and engaging in a trade which has always been taxed by the United States, cannot use its sovereignty to avoid the tax which others in the same State and in other States are required by ancient Federal statutes to pay as a license on such trade.

We cannot be criticized for producing no case in which a Federal tax upon corporate charters has been declared unconstitutional, because until the enactment of the ex-

traordinary law now under consideration no such tax has been imposed by Congress. In one hundred and twenty-two years of legislation under the Constitution the corporation tax of 1909 is the first of its kind.

While we can produce no decision, we have shown the principle underlying all the decisions respecting infringement by taxation upon the sovereignty either of the Nation or of the States, and that principle as clearly forbids a Federal tax upon the States' exercise of crown prerogatives as it does a State tax upon a Federal franchise. If we run through the cases decided by this Court we find expressions, not decisions, it is true, but expressions indicating that in American jurisprudence the power to tax a corporate franchise rests only with the State which creates it. Thus: where Mr. Justice WOODBURY, in a concurring opinion (6 Howard, at page 548), spoke of a corporate franchise as a contract between the State and a corporation which "may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it;" where Mr. Justice SWAYNE said (15 Wallace, at page 296) that it was "not to be questioned that the States may tax the franchises of companies *created by them*"; where Mr. Justice BRADLEY (21 Wallace, at page 473) spoke of the "very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations;" where Mr. Justice JACKSON, then Circuit Judge (52 Fed. Rep., at pages 112-3) spoke of the right of Congress to place restrictions upon the rights of corporations created by its authority as distinguished from corporations created by

the States; or where the precise point was conceded for argument's sake in the opinion of Mr. Justice PECKHAM in *Nicol v. Ames*, already quoted.

And, though found in a dissenting opinion, we think the language of Mr. Justice BREWER in speaking for himself and the Chief Justice accurately reflects the principle. He said:

"It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority."

*Hale v. Henkel*, 201 U. S., 43, 86.

We have shown, beyond the possibility of dispute, we think, that the burdens of the corporation tax law fall on the franchise of the defendant corporation and on the franchise of every corporation. It follows irresistibly from this that the law puts a burden on the power of the States to create corporations. The mere phraseology used in the statute—"special excise tax with respect to the carrying on or doing business"—counts for little as against the substance and effect when the constitutionality of the law is attacked.

*Pollock v. Farmers' Loan and Trust Co.*,  
157 U. S., 429, 580-1 (1895).

*Knowlton v. Moore*, 178 U. S., 41, 81 (1900).

*Spreckels Sugar Refining Co. v. McClain*, 192  
U. S., 397, 411 (1904).

As Chief Justice MARSHALL said:

"Is the proposition to be maintained, that the Constitution meant to prohibit names and not things?

That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing?

*Craig v. Missouri*, 4 Peters, 410, 433 (1830).

So we cannot believe that this Court will permit the plain language of the tenth amendment to the Constitution to be evaded by a device which clothes an invasion of State sovereignty in a new name.

We submit that among the "ordinary functions" of State government is the creation of corporations, and that the exercise of a prerogative of sovereignty in creating them is "strictly governmental." If it is not essential to the existence of the States in the measure of independence guaranteed them by the Constitution that this function should remain unimpaired, it is for the States so to decide in a constitutional manner. Possibly, on the submission of a constitutional amendment giving Congress power to tax the franchises of State corporations, the States might grant it, but until they do so it is not consistent with our frame of government and duality of sovereignty to presume on such consent.

The invasion of State sovereignty through the corporation tax is actual and real. It is not mere assertion of a conclusion by the pleader that if this defendant corporation discloses to its competitors its private affairs and is liable to a tax of this sort it will have to surrender its charter. No person of the slightest business experience can doubt that the imposition of the tax and the forced publicity of corporate affairs as distinguished from the

privacy of the affairs of partnerships and individuals and their exemption from a like tax will drive to the wall this defendant corporation and all similar small corporations which compete with partnerships and individuals. It may not seriously affect the larger and stronger corporations with which the investor is familiar, but it is beyond peradventure that the small corporations which live surrounded by competitors will be extinguished by this devastating law if this Court permits the law to stand. There never has been a better illustration of the truths that the power to tax involves the power to destroy and that the power to destroy may render useless the power to create. All the reserved power of the States to create these small corporations would be rendered as useless as if it never had existed.

It is no answer to say, as the directors of the defendant corporation have said, that a co-partnership may be formed to take over the assets of the Stone Tracy Company. That company, as a corporation, as a body created by the State of Vermont, is threatened with extinction through the enforcement of a Federal statute and it would be absolutely frivolous to suggest as a defense of the statute that the assets of the corporation could be saved from the wreck and turned over to another concern.

In this case, then, the operation of the law would result in confiscation instead of taxation.

*"For taking away our charters"* was one of the grievances of the American colonies against the King of Great Britain. At the time the Declaration (containing these very words) was written the people of Vermont had already rendered conspicuous service in the war for inde-



pendence. It would be an astonishing result if, years after that independence had been won, it should be found that the government established by the colonies themselves had become an instrument "for taking away our charters."

The decision which we ask this Court to make involves no diminution of the potential resources of the National Government. A result of that nature harassed the thoughts of some of the members of this Court when the Income Tax cases were pending. This is no such case. The taxing power of the Federal Government may reach the business of the defendant corporation for two per cent., for ten per cent., for fifty per cent., if necessary, if it will but seek out all who are engaged in the same business and not attempt to tax the corporate franchise. It is that attempt by Congress to tax a franchise created by the State and not the general power to tax that makes this argument.

We summarize our argument in support of the proposition that the general government cannot tax the franchise of a State corporation thus:

FIRST: A State cannot tax an instrumentality of the Federal Government (*McCulloch v. Maryland*, 4 Wheaton, 316; *Osborn v. United States Bank*, 9 Wheaton, 738; *Weston v. City Council of Charleston*, 2 Peters, 449; *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435; *Bank of Commerce v. New York City*, 2 Black, 620.)

SECOND: For the same reason, and because a State is as independent a sovereignty within its sphere as the National Government, Congress cannot pass any law taxing an in-

strumentality of a State (*Collector v. Day*, 3 Clifford, 376; s. c. 11 Wallace, 113; *United States v. Railroad Company*, 17 Wallace, 322; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 429.)

THIRD: The Federal Courts have assumed, and the highest State Courts have decided, that a State cannot tax patents granted by the general Government (*McCulloch v. Maryland*, 4 Wheaton, 316; *Patterson v. Kentucky*, 97 U. S., 501; *Webber v. Virginia*, 103 U. S., 344; *Allen v. Riley*, 203 U. S., 347; *In re Sheffield*, 64 Fed. Rep., 833; *Commonwealth v. Westinghouse Co.*, 151 Pa. St., 265; *The People ex rel. Edison Co. v. Board of Assessors*, 156 N. Y., 417.) A patent is a franchise (*Bloomer v. McQuewan*, 14 Howard, 539), that can be granted concurrently by both the State and the United States (*Livingston v. Van Ingen*, 9 Johnson, 507; 1 Robinson on Patents, Section 45), and is clearly not an instrumentality of either State or Federal Government.

FOURTH: This Court has held that a State cannot tax the franchise granted to a Federal corporation, and the decision is placed not upon the ground that the corporation is an instrumentality of the Government, but because the franchise "emanates from, and is a portion of, the power of the Government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government, and repugnant to its paramount sovereignty" (*California v. Central Pacific Railroad Co.*, 127 U. S., 1, 41).

FIFTH: Inasmuch as the principle of the decision that a State cannot tax a Federal instrumentality was held to

apply when the question was reversed and Congress undertook to tax a State instrumentality, it would seem to follow that the reasons and principles for the decision that a State cannot tax a Federal corporate franchise would also apply to an attempt by the General Government to tax a corporate franchise granted by a State.

We close this point with quotations from opinions of this Court which fully cover the field of this argument.

“It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the general government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of State legislation, renders them liable.” (Opinion of the Court by Chief Justice FULLER in *Central Pacific Railroad v. California*, 162 U. S., 91, 122, quoting from dissenting opinion of Mr. Justice BRADLEY in *Railroad Co. v. Peniston*, 18 Wallace, 5, 48).

“Every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity.” (Opinion of the Court by Mr. Justice SWAYNE in *Farrington v. Tennessee*, 95 U. S., 679, 685.)

“That principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.” (Opinion of the Court by Mr. Justice FIELD, in *Wisconsin Central Railroad v. Price County*, 133 U. S., 496-504.)

“In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other.” (Opinion of the Court by Mr. Justice BREWER in *Matter of Heff*, 197 U. S., 488, 505.)

## SECOND POINT.

**The defendant corporation would be deprived of its property without due process of law.**

We have shown that the corporation tax law, if it is found to impose in substance a tax on the franchise of the corporation (whether it take the form of a franchise tax, a license tax, an occupation tax or any other species of tax or excise), must be declared an unconstitutional invasion of the sovereignty of Vermont. While we believe that the Court will find the law to be unconstitutional on that ground, nevertheless if there can be a judicial conception of the corporation tax law which attributes to a cause other than the existence of the franchise and the corporate capacity the liability of the defendant corporation to the burdens of this statute, or if, as we believe, corporate capacity is the cause of liability, we propose showing that the statute, however construed, would deprive the defendant corporation of its property without due process of law.

In taking up this branch of our argument we assert that no justification for this tax is to be derived from any analogy to State corporation taxes. The relation of the States to corporations is different from the relation of the United States to the defendant corporation. A State grants a corporate charter, and it may impose on that charter such conditions to the grant, whether in the form of taxes or otherwise, as it sees fit. The State, also, has the power of excluding from its borders any foreign corporation, and may impose upon foreign corporations, as a condition to being allowed to do business and exercise their corporate franchises within the State, any tax or other burden. A brief examination of some of the decisions of this Court will disclose full support for what we have stated.

Franchise taxes imposed by States on corporations created by such States have frequently been considered and sustained by this Court.

*Society for Savings v. Coite*, 6 Wallace, 594 (1867).

*Provident Institution v. Massachusetts*, 6 Wallace, 611 (1867).

*Hamilton Company v. Massachusetts*, 6 Wallace, 632 (1867).

*Home Insurance Co. v. New York*, 134 U. S., 594 (1890).

And we understand that the true theory upon which a State may tax a franchise granted by it is that stated by Mr. Justice FIELD in *Home Insurance Co. v. New York*, 134 U. S., 594, 600 (1890):

“The granting of such right or privilege rests entirely in the discretion of the State, and, of

course, when granted, may be accompanied by such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The States also for years have been requiring the payment of license fees from foreign corporations as a condition to the right to do business or to exercise their corporate franchises within such States. These license fees are not franchise taxes. They are the price which the States, having the right to exclude foreign corporations altogether, may exact for the privilege of entering such States and doing business therein. The theory upon which these license fees are exacted is stated by the same learned Justice.

In *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 181 (1888), Mr. Justice FIELD, said at page 186:

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employes; nothing more and nothing less; \* \* \*."

And in the case of *Horn Silver Mining Co. v. New York*, 143 U. S., 305 (1892), he said at page 315:

"Having the absolute power of excluding the

foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges."

See also to the same effect

*Maine v. Grand Trunk Railway Co.*, 142 U. S., 217, 227-8.

Neither the reason of the State franchise taxes nor of the State license taxes on foreign corporations can support the constitutionality of the Federal corporation tax on the defendant corporation; for the defendant corporation was not created by the United States nor has the United States the right to say it shall not do business in Vermont in a corporate capacity.

We understand that the only thing that would prevent the State corporation tax laws from being held to deny to corporations the equal protection of the laws is that the State itself granted the charter and may prescribe the conditions under which it is enjoyed. In *Berea College v. Kentucky*, 211 U. S., 45, Mr. Justice BREWER said at page 54:

"In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted,

may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.' \* \* \* \* Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State."

Congress, then, in classifying corporations as the objects of a special corporation tax assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. We submit that there is none and that every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. The defendant corporation in its business of dealing in merchandise pursues the same methods as the firm of Dwight Tuxbury & Sons. It buys for cash or on credit in the same way as the firm. Precisely as the firm, it endeavors to sell at a profit for cash, or credit, or for commodities. No drummers selling goods in Windsor could perceive any essential difference between the shops of Dwight Tuxbury & Sons and the Stone Tracy Company. No customer in buying goods in Windsor could see any essential difference between the two shops. They are, to all intents and purposes, of the same class. To subject one and not the other to a tax "in respect to the carrying on or doing business" seems the extreme of arbitrariness.

We quote from the opinion of this Court in two cases. In *Kansas Pacific Railroad Co. v. Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S., 414 (1884), Mr. Justice FIELD, speaking for the entire Court, said at page 415:

"A private corporation is, in fact, but an associ-



ation of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution."

And again, the same learned Justice in *McKinley v. Wheeler*, 134 U. S., 630 (1889), speaking for the entire Court, said at page 633:

"They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution."

Therefore for Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. We think that our position is well stated by Mr. Justice FIELD's concurring opinion in *San Bernardino County v. Southern Pacific Railroad Company*, 118 U. S., 417 (1885), where he was discussing the quite analogous case of a State's denying the equal protection of the laws to a corporation in the method of valuing property for taxation. He said at page 422:

"I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth

Amendment of the Constitution. At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from consideration when it is owned by them, and considered when it is owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions.”

We say that classifying corporations by Congress for the imposition of Federal taxes and other special burdens takes their property without due process of law and without just compensation in violation of the Fifth Amendment.

What is “due process of law”? It is process which accords with those “immutable principles of justice which ‘inhere in the very idea of free government’” (*Holden v. Hardy*, 169 U. S., 366, 389), which proceeds from “laws

“ operating on all alike and not subjecting the individual  
 “ to an arbitrary exercise of the powers of government un-  
 “ restrained by the established principles of private rights  
 “ and distributive justice ” (*Leeper v. Texas*, 139 U. S.,  
 462, 468). These principles have been stated time and  
 again in the opinions of this Court from the case of *Bank*  
*of Columbia v. Okely*, 4 Wheaton, 235, 244, to the case  
 of *Twining v. New Jersey*, 211, U. S. 78, 101-2.

Congress must conform to these principles in the passage  
 of every law. As Mr. Justice CURTIS, speaking for the  
 entire Court in *Murray v. Hoboken Land Co.*, 18 Howard,  
 272 (1855), said at page 276 :

“ But is it ‘due process of law’? The Con-  
 stitution contains no description of those pro-  
 cesses which it was intended to allow or forbid. It  
 does not even declare what principles are to be ap-  
 plied to ascertain whether it be due process. It is  
 manifest that it was not left to the legislative power  
 to enact any process which might be devised. The  
 article is a restraint on the legislative as well as on  
 executive and judicial powers of the government, and  
 cannot be so construed as to leave Congress free to  
 make any process ‘due process of law,’ by its mere  
 will.”

The defendant corporation is entitled to the protection  
 of this constitutional safeguard for, as Chief-Justice  
 WAITE said in the *Sinking Fund Cases*, 99 U. S., 700, at  
 page 718, the United States “equally with the States”  
 “are prohibited from depriving persons *or corporations*  
 “of property without due process of law.”

The limitations on the powers of Congress to levy and  
 collect taxes are not alone in those provisions of the Fed-  
 eral Constitution which relate exclusively to taxation.

As Mr. Justice FIELD said in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 599:

"There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations \* \* \* of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations."

We therefore say that the arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporation and wholly exempting its business competitor from every one of them is not due process of law. We weigh the situation by the opinions of this Court.

In *Ballard v. Hunter*, 204 U. S., 241 (1907), Mr. Justice McKENNA, quoting with approval from Mr. Justice BRADLEY, said, at page 255:

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.' "

The arbitrary discrimination against the defendant corporation would surely be a denial of the equal protection of the law if the language of the fourteenth amendment applied to an act of Congress.

In *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283 (1898), Mr. Justice McKENNA said, page 294:

"Clear and hostile discriminations against particu-

lar persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley, in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232, 237.

"And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S., 150, 165, after careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' "

It seems as if the case at bar furnished the strongest possible instance of where "a tax law directly, necessarily "and intentionally creates an inequality of burden," to quote the expression used by Mr. Justice BREWER in his dissenting opinion in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., at page 301, and that in his language "it becomes imperative to inquire whether this inequality "thus intentionally created can find any constitutional "justification."

The denial of equal protection of the laws and the taking of property without due process of law are, so far as this case is concerned, the same thing, because the injury complained of lies in the enforcement of a statute which is unequal and arbitrary. As Chief Justice FULLER said in speaking for the entire Court in *Duncan v. Missouri*, 152 U. S., 377 (1894):

"Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Gulf, Colorado and Santa Fe Railway Co. v. Ellis*, 165 U. S., 150 (1897), it appears that a Texas statute provided that if claims on contract or in tort against railroad corporations were not promptly paid, the plaintiffs suing thereon and obtaining judgment for the full amount, might add thereto an attorney's fee of ten dollars. "The single question in this case is the constitutionality of the act allowing attorneys' fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law" (pp. 152-3). Railroad companies alone were subject to the burdens of the statute.

The Court pointed out that classification of railroads for certain purposes was just; as, for example, for fencing tracks, or for the use of safety-couplers (pp. 158-9), but that every lawful classification "must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (p. 155). And Mr. Justice BREWER, in delivering the opinion of the Court, also said, at page 159:

"The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed

upon others guilty of like delinquency this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." \* \* \*

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (Pages 165-6.)

It was held in the *Ellis Case* that to compel a corporation to pay an attorney's fee to a plaintiff who was successful in a case against it, and not to require an individual defendant to pay an attorney's fee under the same conditions, was as arbitrary, and unfair, and unequal, and unjust as to compel a white defendant to do so and not require a black defendant to do so. In other words, a corporation was placed precisely on the same basis as an individual.

Now the taxing power of the Federal Government (if this tax is to be deemed an excise or occupation tax, which we deny) is to be exercised on the people doing business in the United States, that is, on the business done in the United States. Now the business of this country is done by the people either in an individual capacity, or in a partnership capacity, or in a corporate capacity, and the selection for taxation of one class out of all the people doing business in this country is, we submit, class legislation and unequal.

If the Federal Government in laying this tax had imposed it alone on people doing business in this country in an individual capacity, would there be much doubt in anybody's mind but that the selection for taxation of individuals alone would have been arbitrary and unequal and a deprivation of their property without due process of law?

If the taxing power had selected for taxation from all the people doing business in this country only those doing business in a partnership capacity, would such a discrimination have been deemed a lawful classification, and one which rested "upon some difference which bears a



reasonable and just relation to the act in respect to which the classification is proposed ”?

Now if the selection, for taxation by the general government from all the people doing business in this country, of only those who do business in an individual capacity, or of only those who do business in a partnership capacity, is arbitrary and unlawful, then it must follow that the selection for taxation of those alone who do their business in a corporate capacity is equally arbitrary and unjust; for under the decision of the *Ellis Case* the corporation and the individual stand on the same ground so far as in this country there rests on Congress and State Legislatures the obligation to make equal laws.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary. No such extraordinary claim has ever been or ever will be made. With the concession that a federal law which deprives a man of his property is arbitrary and unequal, it follows that such law deprives him of his property without due process of law, and is in clear violation of the provisions of the Fifth Amendment to the Constitution.

The Fourteenth Amendment to the Federal Constitution is but declaratory of the law as it had long existed. There was nothing new in it and the provision as to the equal protection of the laws was simply a restatement of an old idea.

As long ago as 1778 Sir William Meredith speaks of the importance of equal laws in his work entitled—“ His-

tical Remarks on the Taxation of Free States" (published in 1778), as follows at p. 39.

"If many a page in the history of worldly interest and ambition did not prove the fact, it would be thought incredible that, in a country of liberty, men can be found ready to promote measures that tend to destroy that property in equal laws, which constitutes the best part of a free man's inheritance."

This provision of the Fourteenth Amendment as to equal laws was undoubtedly already covered by the previous clause in the same amendment forbidding a State to deprive any person of his property without due process of law, but was added to the amendment out of abundant caution, just as in the Fifth Amendment we find the clause, "nor shall private property be taken for public use, without just compensation," but do not find such clause in the Fourteenth Amendment.

The argument that, because such clause was omitted from the Fourteenth Amendment, therefore a State could take a man's property for a public use without just compensation has never been sustained by this Court, but it has been held that any State which undertakes to take property for a public use without just compensation deprives a man of his property without due process of law, and is therefore restrained from so doing by the provision of the Fourteenth Amendment that no State shall deprive any person of property without due process of law. *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U. S., 226, 241.

We simply apply the principle of the decision just cited and insist that the omission from the Fifth Amendment of the provision as to the equal protection of the laws does not give the right to Congress to pass an un-

equal and oppressive law, as such a law would in effect take property without due process of law and is clearly forbidden by the provision of the Fifth Amendment which says that no person shall be deprived of property without due process of law.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79 (1901), this Court unanimously held that a Kansas statute which purported to regulate rates and other matters at stock yards transacting above a certain amount of business, and which statute in reality touched only the defendant, denied to the defendant the equal protection of the laws.

Mr. Justice BREWER said at page 111:

“But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.”

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540 (1902), this Court held that the Illinois statute prohibiting illegal combinations in business was unconstitutional because it discriminated against certain classes of industry. The character of the statute is well illustrated by the following extract from the opinion of the Court by Mr. Justice HARLAN at page 564:

“Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or

acts for the purpose of establishing, controlling, increasing or reducing prices, or preventing free and unrestrained competition amongst themselves or others in the sales of their goods and merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

In the two latter cases the majority of the Court expressly reserved the question whether the unconstitutional features of the statutes there under consideration would not also work a taking of property without due process of law.

In these cases the Court mentions a theory that in tax statutes the States are permitted a more unbridled lati-

tude in discriminating or in "classifying" as it is called. This distinction Mr. Justice McKENNA in his dissenting opinion in the case last cited (p. 570) seemed to deny; and the opinion of the Court in *Cox v. Texas*, 202 U. S., at pages 450-1, seemed to question its existence; but whether it really exists or whether its existence rests on any permanent and logical foundation, it seems clear that even in tax statutes the Federal constitution cannot be utterly disregarded. The language in one of these tax cases—*Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232—has already been quoted. That case clearly indicates the law to be that "clear and hostile" discrimination against a class, especially such a discrimination as is "unusual" or "unknown," would render any tax statute unconstitutional, while discrimination which proceeds "within reasonable limits and general usage" would be sustained. While in that case the lawmaking power was the same power as that creating the corporation which was taxed, we ask no greater protection than what this Court thus intimated could be afforded under the Federal Constitution. The "corporation tax" declares a discrimination "clear and hostile" upon companies which owe the general government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." We have shown that it does not proceed within "reasonable limits," for in the reason of things there is no basis for the discrimination; and as for being within "general usage," the fact that it was hitherto unknown condemns it upon that ground.

So in many of the recent tax cases where the tax was sustained and where the right of the State to classify was admitted, it was clearly intimated that the protection of the Federal Constitution still exists where due process and equal protection of law is denied. For instance, in *American Sugar Refining Company v. Louisiana*, 179 U. S., 89-92, it was said that "arbitrary, oppressive or capricious" discrimination would deny the equal protection of the laws; and in *Billings v. Illinois*, 188 U. S., 97-101, it was said that "classification must be based on some reasonable ground."

We therefore are safe in saying that if statutes respecting taxation are entitled to looser treatment than other statutes in testing their constitutionality, there are still clearly the requirements that such statutes must not discriminate on unreasonable grounds and must not be oppressive or arbitrary. These requirements the corporation tax law completely disregards.

The latest utterance of this court on the subject is found in *Southern Railway Company v. Greene* (Decided Feb. 21, 1910), where it was held that a statute of Alabama requiring a foreign corporation, authorized to do business in the State, to pay a special tax denied to such corporation the equal protection of the laws, for the reason that domestic corporations "owning the same character of property and carrying on the same kind of business" were not required to pay a similar tax. In the course of his opinion Mr. Justice DAY said:

"We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth

Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal protection of the laws.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155, 165; *Cotting v. Kansas City Stock Yards*, 183 U. S. 79; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign

corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

If a law selecting for purposes of taxation foreign corporations out of all the corporations doing business in a State is deemed arbitrary and an unwarranted classification because one corporation is taxed and another "owning the same character of property and carrying on the same kind of business" is not, it is difficult to see why the imposition of a tax upon a corporation and the exemption from taxation of a partnership "owning the same character of property and carrying on the same kind of business" is not equally arbitrary and unequal.



### THIRD POINT.

**The Corporation Tax Law is unconstitutional because it takes property for public use without just compensation.**

We further say that the Corporation Tax Law is unconstitutional because taking private property for public use without just compensation. We do not refer especially to the one per cent. collected on the net income over five thousand dollars or to the incidental extinction of the corporate franchise, but rather to the peculiar requirement of Subdivision 6 of the corporation tax law which says that the returns “*shall constitute public records and be open to inspection as such.*”

Under the provision quoted the Stone Tracy Company's debts, its gross income, its dividends received, its expenses, rentals and franchise payments, its losses, its allowances for depreciation, its interest paid on its indebtedness, its taxes and its net income become publicly known. Thus that property which the defendant corporation has in the privacy of its affairs, in keeping to itself the contents of its books, papers and accounts and its trade secrets, is not only invaded but destroyed. Such property is, we take it, of a kind of which the Federal Constitution was designed to take most jealous care, for the Fourth Amendment provides that the right to such property shall not be violated by unreasonable searches and seizures.

We desire to impress upon the Court that the publicity of the returns under the Corporation Tax Law is not required for the purpose of imposing the tax. After the

assessment is made, and the Government has entirely finished with the returns, then they are to become for the first time public records open to inspection. Even if no tax is levied by the Commissioner of Internal Revenue, because there is no income in excess of five thousand dollars, yet the return is still required to become a public record open to inspection. All tax laws require full returns to be made for the information of the Government to be used in laying the tax, but no law that we know of ever before provided that when the Government had imposed the tax, and finished with the returns, they should then be made public property.

This property is not only taken, but it is taken without just compensation and for no cause which stands in legitimate relation to the power to tax. Manifestly, the exposure to the public of the contents of the defendant corporation's return, after the assessment is made and falls due, can in no way enhance the public revenues. It is an arbitrary and wholly independent action on the part of the government, visitatorial and disciplinary in its nature, and not, in any sense, for revenue purposes.

There is no question that a corporation is protected under the Fifth Amendment against the taking of its property without just compensation.

*Monongahela Navigation Co. v. United States*,  
148 U. S., 312 (1893).

And in the case of *Hale v. Henkel*, 201 U. S., 43 (1906), Mr. Justice BROWN, in delivering the opinion of the Court, said at page 76:

“We do not wish to be understood as holding that a corporation is not entitled to immu-

nity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

#### **FOURTH POINT.**

**The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned.**

We believe that we have shown beyond doubt that this tax is laid upon the defendant corporation in respect to its franchise to be a corporation and to act in a corporate capacity. We shall now proceed to show that it is also a direct tax.

We do not need to weary the Court with the earlier cases decided by this Court on the question of direct and indirect taxation, but we shall start with the assumption that a tax on personal property may be a direct tax within the decisions in the Income Tax Cases of 1895.

*Pollock v. Farmers' Loan and Trust Co.*, 157

U. S., 429; s. c. 158 U. S., 601.

*Nicol v. Ames*, 173 U. S., 509, 520.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no

limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

*California v. Central Pacific Railroad*, 127 U. S., 1, 41-42.

A franchise cannot be regarded as an article of consumption like manufactured tobacco. It is not intended for consumption or sale. Therefore a tax on a franchise can not be imposed on it at a period intermediate the commencement of its manufacture and the final consumption of the article within the rule of *Patton v. Brady*, 184 U. S., 608. The tax cannot be avoided by the owners for the time being through a subsequent sale or consumption of the franchise and so become an indirect tax. It remains distinctly of the nature of a capitation or other direct tax. It is, as stated by Professor Beale in his work on Foreign Corporations, "in the nature of a poll tax."

Beale on Foreign Corporations, Sec. 508, p. 665.

So Judge GARRISON in the case of *The Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 529, said in speaking of the New Jersey franchise tax:

(Page 537) "It is in short a poll tax levied upon domestic corporations for the right to be."

We therefore submit that it imposes a direct tax on the franchise of the defendant corporation.

### FIFTH POINT.

**The inclusion of joint-stock companies within the terms of the statute does not affect the argument in the previous points.**

We have treated the statute in our argument as if it were literally a corporation tax. That the substance and spirit of the law is to impose a corporation tax we think there can be no room for doubt; but included in the phrasing of the statute is also "every \* \* \* joint-stock company or association \* \* \* now or hereafter organized under the laws of the United States or of any State, \* \* \* ."

In this country joint-stock companies are quite unusual. Whether their precise number, all told, is six or sixty is immaterial, but except for two or three of the larger express companies we presume that most American lawyers have no practical acquaintance with joint-stock companies or associations. In some cases these companies or associations are considered as partnerships, in others they are considered as corporations. But under whatever name they may go we think that if a company consists of a voluntary association, without deriving from public authority any rights which the members could not have exercised in their natural and individual capacity, that company is a partnership, while, on the other hand, if through public authority the association becomes vested with rights, privileges or franchises which the members could not have enjoyed as individuals or as an

ordinary partnership, then the company partakes of the nature of a corporation and virtually is such.

It is quite clear, apart from the wording of the corporation tax law, that the framers of the law never intended it to apply to a partnership of any kind, for a few hours before the passage of the corporation tax amendment this colloquy occurred in the Senate:

"Mr. Brandegee: Does the Senator desire to answer my inquiry as to whether the matter of imposing a tax upon partnerships was considered at all by the committee?"

"Mr. Aldrich: I will say that it was considered, and the committee thought it raised a cloud of questions which they did not care to discuss or to dispose of" (44 Cong. Rec., 4093).

But the statute itself disposes of the question by selecting only such joint-stock companies as are "organized under the laws of the United States or of any State," etc., which therefore means only those that have been legalized—*i. e.*, enfranchised—by public authority.

In *Liverpool Insurance Company v. Massachusetts*, 10 Wall., 566 (1870), this Court held that a British insurance company organized under acts of Parliament as a joint-stock company was a corporation and would be held so under the laws of most of the States although in that case the stockholders were individually liable for debts of the company. The Court held that its distinctive and artificial name by which it made its contracts, its power to sue and be sued in the name of one of its members, the power of members to transfer their interests at pleasure, the power of surviving beyond the lives of its members, etc., all having been legalized by acts of Parliament, assimilated the company to a corporation under our

laws, and in the concluding paragraph of the opinion Mr. Justice MILLER said at page 576 :

“ We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation \* \* \* .”

In the case of *Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass., 524 (1876), it was held that under the Massachusetts statutes joint-stock companies were to be regarded as corporations organized under general laws as distinguished from corporations formed under special charters.

In *People ex rel. Platt v. Wemple*, 117 N. Y., 136 (1889), the United States Express Company, one of the very few important joint-stock companies in America, was said to have “ the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships ” (p. 144). That case is especially interesting from the fact that it involves the interpretation of a tax statute of New York which was evidently taken in part as the form for the corporation tax law of 1909. The New York statute provided that :

“ Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State \* \* \* shall be subject to, and pay a tax, as a tax upon its corporate franchise or business” \* \* \* .

The United States Express Company maintained that it was a mere partnership and not within the statute, but

the Court, pointing out the articles of association and the peculiar rights which it purposed exercising and that statutes of the State of New York provided for just such an organization, concluded that it was not a partnership and was taxable. From the opinion of the New York Court of Appeals we extract the following at page 146:

“In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view, also, of the statutes which legalize its assumed capacities and make valid and effective its asserted right of succession, its distinctive name and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true those articles contain no reference to any statute of the State, as one under or by which the company was organized, yet, by the very constitution of the body itself and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880 (*supra*) as ‘a corporation, joint-stock company or association.’ The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body, and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law, which sanctions the union.”

And on page 147:

“In the case before us the agreement, which brought many persons into one artificial body, was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated,



that is, formed or united under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association."

We think it therefore perfectly clear that the corporation tax law in including joint-stock companies and associations "organized under the laws of the United States or of any State" meant to include only those companies which by virtue of such laws have powers, privileges or franchises similar to those of corporations. It follows from this that the joint-stock companies stand on the same basis as the corporations as far as the corporation tax is concerned.

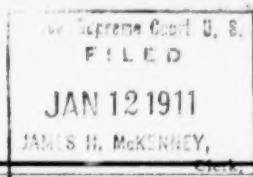
We have, perhaps, extended this point more than was necessary because it seems to us that it is really immaterial how the Court views the joint-stock companies within the provisions of the act. If they are partnerships it must be admitted that they are peculiar, limited and few in number. If it be said that Congress has selected that peculiar form of business organization as one of the objects of taxation under the corporation tax law and if it be said that joint-stock companies have no corporate franchises or other franchises created by sovereignty, such propositions, even if they were sound, would not in the slightest degree sustain Congress in also selecting for taxation corporate capacity and thereby placing a tax on corporate franchises. In other words if Congress could put an excise tax on joint-stock companies because they are partnerships enjoying no franchises from state sovereignty it does not follow that Congress may place a similar tax on corporate franchises enjoyed by corporations.

**SIXTH POINT.**

**The judgment of the Court below should  
be reversed.**

MAXWELL EVARTS,  
HENRY S. WARDNER,  
Of Counsel for Appellant.





# Supreme Court of the United States.

OCTOBER TERM, 1910.

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No. 407.

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STELLA P. FLINT, as General Guardian of the Property of  
SAMUEL N. STONE, Junior, a Minor,  
*Appellant,*

*vs.*

STONE TRACY COMPANY, FRANK B. TRACY, IDA S.  
TRACY and LEON B. HAYWARD,  
*Appellees.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF VERMONT.

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## BRIEF FOR APPELLANT ON REARGUMENT.

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MAXWELL EVARTS,  
HENRY S. WARDNER,  
*Of Counsel for Appellant.*

JOHN G. SARGENT, *Attorney General of Vermont,*  
*representing the State of Vermont,*  
*with Counsel for Appellant.*



**Supreme Court of the United States,**

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
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**BRIEF FOR APPELLANT ON REARGUMENT.**

**Statement.**

In the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership for carrying on a general retail mercantile busi-

ness in the village of Windsor, Vermont, and that firm, called Tuxbury & Stone, carried on such business continuously, on the main street of the village, for upwards of twenty-nine years. The business was prosperous, and its shop became the principal one of its kind, not only in the village, but in an area of some ten square miles of the surrounding country. While the firm, from time to time, took in other partners, there was no essential change in the management until 1895, when the firm dissolved and two new firms were formed therefrom. One of the new firms was headed by Tuxbury, and was styled Dwight Tuxbury & Sons, while the other was headed by Stone, and was styled Stone, Tracy & Company.

The firm of Stone, Tracy & Company retained the original stand of Tuxbury & Stone, and engaged in the same business as had been carried on by the old firm. The firm of Dwight Tuxbury & Sons erected a building on the same street, and next door to Stone, Tracy & Company, and engaged in the same line of business.

In the year 1900 the persons composing the firm of Stone, Tracy & Company obtained from the State of Vermont a corporate charter, and, under such charter, organized a corporation, called the Stone Tracy Company, for carrying on a general retail mercantile business. The defendant corporation is the corporation so formed. It took over all the business of the firm of Stone, Tracy & Company, and has continued to carry

on at the original stand of Tuxbury & Stone a general retail mercantile business. In carrying on such business it has met the direct, active, and constant competition of the firm of Dwight Tuxbury & Sons, which firm has continued to carry on a general retail mercantile business next door to the shop of the defendant corporation and employing about the same amount of capital. The defendant corporation has prospered, and has transacted, during each of the last five years, a business of not less than from \$75,000 to \$100,000, which, in volume, approximates that carried on by its competitor. Continuing to compete next door to each other, these two shops have become the only general merchandise shops in the village, and the principal ones in a surrounding area of twenty square miles.

A return of the business of the defendant corporation if made as required by the provisions of the Act of Congress of August 5, 1909, relating to the so-called "corporation tax," through becoming a public record, will disclose to the firm of Dwight Tuxbury & Sons and to the public generally the gross income of the defendant corporation, its indebtedness, its dividends received, its expenses paid, its charges for depreciation, its rentals and franchise payments, its losses sustained, the interest paid on its debts, the amount of its taxes and its net income. The net income of the defendant corporation will exceed \$5,000, and the corporation tax



will therefore be assessed. Since, under the provisions of the law, no such return and no such tax can be required of copartnerships, the firm of Dwight Tuxbury & Sons would be given a great advantage over the defendant corporation through the disclosure of the details of the business and private affairs and trade secrets of the defendant corporation, while no such disclosure of the affairs of the firm of Dwight Tuxbury & Sons would be required or permitted. The advantage thus given to the competitor of the defendant corporation would compel the defendant corporation to surrender its corporate charter, dispose of its assets and go into voluntary dissolution.

The complainant, as a stockholder of the Stone Tracy Company, requested the defendants to contest the constitutionality of the Corporation Tax Law and not to comply with its provisions, but the defendants refused to do so and assert that they intend to make the return and pay the tax.

Thereupon the appellant, who was the complainant in the Court below, brought, in the United States Circuit Court for the District of Vermont, her bill in equity as a stockholder in the defendant corporation to restrain it and its directors from voluntarily making the return of income and other details of its business, as required by the so-called "corporation tax" provisions of the Act of Congress of August 5, 1909, and from paying the tax. She averred in her bill that the law was an invasion of the

power of the State of Vermont to grant and preserve the charter of the defendant corporation, that making and publishing the return and paying the tax would be a taking of property without due process of law, and a taking of private property without just compensation, that the law violates the right of the defendant corporation to be secure in its papers and effects from unreasonable searches and seizures, that it imposes a direct and unapportioned tax on the franchise of the defendant corporation, and that if the tax is not direct it is not uniform throughout the United States (Record, pp. 6, 7).

She further averred that the defendants in intending voluntarily to comply with the act were intending to commit a breach of trust in disclosing to the chief competitor of the defendant corporation and to the public the private affairs of the defendant corporation and diverting its funds (Record, p. 5).

The case was one within the jurisdiction of the Circuit Court by virtue of Section 629, Subdivision 4, of the Revised Statutes of the United States, as one arising under a law providing internal revenue. The defendants demurred for want of equity. The Circuit Court sustained the demurrer and dismissed the bill and the complainant, setting forth that in this case the constitutionality of a United States statute was drawn into question, prayed an appeal to this Court, which was duly allowed (Record, p. 13).

The provisions of the "Corporation Tax Law" which are particularly discussed in this brief follow :

"SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed \* \* \*".

Subdivision Third of the above section requires every corporation subject to the provisions of the law to make and file a return showing the details of its business.

"SIXTH. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

### **Specification of Errors.**

The Court below erred :

FIRST. In sustaining the demurrer of the defendants.

SECOND. In not overruling the demurrer of the defendants.

THIRD. In not holding that the Corporation Tax Law of August, 1909, is unconstitutional for the reason that the corporate franchise granted to the Stone Tracy Company by the State of Vermont is not a legitimate subject of taxation by the general government, and for the further reason that such taxation is a violation of the Tenth Amendment to the Federal Constitution.

FOURTH. In not holding said law unconstitutional for the reason that it is unequal, unjust and oppressive in that it singles out for taxation from all the men doing business in this country those alone who do their business in a corporate capacity, leaving untaxed their competitors doing business in an individual or a partnership capacity, and that such an unequal law de-

prives the Stone Tracy Company of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Federal Constitution.

FIFTH. In not holding the said law unconstitutional for the reason that the provision requiring the publicity of the affairs of the Stone Tracy Company after the government has finished with the return and has levied the tax takes from said corporation its property, *i. e.*, its right to the privacy of its affairs, for a public use, without just compensation.

### **FIRST POINT.**

**The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the State of Vermont.**

#### **A.**

THE TAX AND THE OTHER BURDENS OF THE CORPORATION TAX LAW FALL UPON THE CORPORATE FRANCHISE OF THE DEFENDANT CORPORATION.

In his message sent to Congress June 16, 1909, the President, suggesting the passage of the corporation tax, said :

“ I therefore recommend an amendment to the tariff bill imposing upon all corporations and

joint stock companies for profit, except national banks (otherwise taxed), savings banks, and building and loan associations, an excise tax measured by 2 per cent on the net income of such corporations. *This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock*" (44 Cong Rec., p. 3344).\*

On June 24, prior to the introduction of the Corporation Tax amendment, Senator Newlands said:

"If, however, it be held that the suggested tax is, as the President asserts, 'a tax upon the privilege of doing business as an artificial entity,' that is to say, a tax upon the right to be a corporation, it will probably be contended that the corporate franchise is the creation of the state sovereignty; that the power to tax is the power to destroy; and that the Nation has no power, for this reason, to tax the franchise granted by the State?" (44 Cong. Rec. 3757.)

On the following day the corporation tax amendment was introduced in substantially the form in which it was finally adopted. It provided:

"That every corporation, joint stock company or association, organized for profit and

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\* The references to the Congressional Record are to pages of the regular bound edition and not to pages of the daily edition issues. The references in our former brief were to pages of the daily edition issues of the Congressional Record.

having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to 2 per cent upon the entire net income over and above \$5,000 received by it from all sources during such year \* \* \*." (44 Cong. Rec., 3836.)

The amendment was redrafted and substantially reintroduced on June 29, but the provisions above quoted were not changed by that amendment. (44 Cong. Rec., 3935.)

In attempting to reply to Senator Brandegee's inquiry as to whether the tax was not on the privilege to do business, Senator Carter had this to say :

" Mr. Carter : Mr. President, the Senator's discussion is very interesting and very instructive. According to my view, the Federal Government does not assume by the passage of this amendment to extend any privilege to any corporation in a State or to deny any right or privilege now enjoyed by a corporation organized by a State. The amendment merely proposes a classification of subjects for taxation. The corporation is not to be assessed for the privilege of doing business, because that privilege cannot be denied if the corporation is organized under the laws of a State, if its pur-

poses are legitimate and not in contravention of public policy. *The tax is assessed because certain business is being done in a certain form or method of organization, by incorporation or as joint-stock companies. It is not a license and not a tax on property, but a tax on that method of doing business, and because the business is being done under that legal form.*

"Mr. Brandegee: Does the Senator from Montana claim that where a State charters a corporation the United States Government can definitely impose a tax upon that corporation because it has presumed to exist under the laws of its own State?

"Mr. Carter: Well, Mr. President, unquestionably in the levying of the tax on bank circulation Congress did interpose its hand and levy a tax which operated to extinguish the banks of issue in the States" (44 Cong. Rec., 4024).

Senator Root, in his defense of the measure had placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange and, quoting from the opinion in *Nicol v. Ames* (173 U. S., 509), said:

"\* \* \* It is a tax upon the facility or privilege of doing business in this way.' The objection was made that the tax was one upon a sale of merchandise made in one place, to wit, in the board room, when no tax was imposed upon



the sale of the same merchandise in another place, to wit, out of the board room. The Court said: 'That makes no difference. There is a certain facility, a certain privilege, a certain opportunity of doing this business in the way afforded by this company; and the United States can impose a tax upon that.' And they supported it" (44 Cong. Rec., 4005).

The next day, when pressed further by Senator Brandegee's questions on this point, Senator Root suggested that he would be "very glad if the Senator from Maryland [Mr. Rayner] might make a part of my answer to the question of the Senator from Connecticut" (44 Cong. Rec., 4025); and Senator Rayner, falling back on Senator Root's own words, explained the meaning of the tax as follows:

"Mr. Rayner: This is a tax upon the privilege and the business of a corporation and the facilities of a corporation." \* \* \*

"It is a tax on the privilege and facility of a corporation. It is just as the Senator from New York said yesterday. It could not have been stated better.

"Said the Senator from New York:

" 'It is not the profits that would be subject to the tax, but the privilege or facility of transacting the business through corporate form. It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility or privilege which is taxed' " (44 Cong. Rec., 4029).

We thus have, if it were needed, the admission of leading lawyers of both parties in the Senate that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

The amendment was agreed to on July 2 (44 Cong. Rec., 4060), exactly one week from the day it had been introduced and, in the particulars quoted above, is the precise wording of the law as finally enacted except that the rate of the tax was reduced to one per centum.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and we assert that no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. Not a single demonstration of its validity as a franchise tax was made or even attempted by any Senator. Senator Root's paragraph (44 Cong. Rec., p. 4005), skims lightly over the thinnest ice. He mentions *Veazie Bank v. Fenno* (8 Wall. 533) and offers no reason. Senator Rayner, misled against his instinct and his better judgment by a hasty reading of the same case, conceded without argument the vital point (44 Cong. Rec., p. 4032). Senator Brandegee and Senator Overman doubted and again and again pleaded for light and reason (44 Cong. Rec., pp. 4022-4029; 3977). No light was shed. No reason was given. Except for Senator Bristow's short speech (44 Cong. Rec., p. 4036), Senator Cummins, alone, vigorously attacked the measure as unconstitu-

tional upon the grounds we now urge (44 Cong. Rec., pp. 3977, 3978), but his argument was unheeded, unanswered and perhaps unheard. That there was no answer is not remarkable.

We do not apprehend that we can add materially to what had been said by Senators Root and Rayner on the character of the tax. It is true the law contains the words "with respect to the carrying on or doing business," but those words were merely inserted because of their similarity to words contained in Mr. Justice HARLAN'S opinion in the case of *Spreckels Sugar Refining Company v. McClain* (192 U. S., 397). We revert once more to the Senate debate :

" Mr. Brandegee : \* \* \* \* I should like to ask the Senator from New York if he understands the words ' with respect to ' the transaction of their business to be equivalent to a tax imposed upon their right or privilege to transact business ?

" Mr. Root : I say I think the words ' with respect to the carrying on or doing business by such corporations ' do include the meaning of the words used by the Senator from Connecticut.

" Mr. Brandegee : I should like to ask the Senator also if they include anything else ?

" Mr. Root : I am not prepared to say on the moment whether something more may not be found in them. I am quite sure they do not and can not include anything more than the very relation between

the tax and the carrying on or doing of the business which the Supreme Court has declared to be lawful as a method of taxation under the Constitution, because these words are the words which the Supreme Court itself uses in declaring a tax to be lawful " (44 Cong. Rec., 4022).

Since individuals or copartnerships, though carrying on the same character of business as corporations, are exempt from the operation of the law we see that corporations are taxed not on account of the character of their business but on account of their being corporations and acting in a corporate capacity. To illustrate: The defendant corporation carries on a general retail mercantile business and is subject to all the burdens of this law, while the copartnership of Dwight Tuxbury & Sons carrying on the same kind of business, employing the same amount of capital and in the building adjoining that of the defendant corporation, is wholly exempt. The sole distinction between these two concerns is that one has a corporate charter and franchise from Vermont and does its business by virtue thereof in a corporate capacity while the other is a copartnership.

The burdens of this law, therefore, fall on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity.

For persons to be a corporation and for persons to act in a corporate capacity are one and the same thing and

this thing is a corporate franchise. We take this as established beyond dispute from the language of Mr. Justice FIELD in *Home Insurance Co. v. New York*, 134 U. S., 594 (1890), where, in speaking of the New York tax on the "corporate franchise or business" of a corporation, he said at p. 599 :

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy."

But in addition to the franchise to be a corporation and to act in a corporate capacity there is, in every corporation, the so-called franchise to do the particular business for which it was incorporated. The distinction between these two franchises is quite clearly drawn by Mr. Justice CURTIS in *Hall v. Sullivan Railroad Co.*, 11 Fed. Cas., 257 (1857), where he points out that among the franchises of a railroad company are, first, that of being a body politic with rights of succession of members and of acquiring, holding and conveying property and suing and being sued by a certain name, and, second, to build, own and manage a railroad and take tolls thereon. That decision was quoted by this Court in *Memphis Railroad Co. v. Commissioners*, 112 U. S., 609 (1884), and in the latter case Mr. Justice MATTHEWS said at page 619:

“The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the fran-

chises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

And while the franchise to do, as distinguished from the franchise to be, does not include things which may not naturally be done by individuals, the right of the corporation to do is, nevertheless, limited and defined by the terms of its charter. On this point this Court said by Mr. Justice FIELD in *Horn Silver Mining Co. v. New York*, 143 U. S., 305, 312 (1892):

"A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter."

Thus, while the members of a corporation could, prior to their incorporation, do the things which after incorporation they do in a corporate capacity, they are limited as a corporation to doing such things or business as their charter provides.

The persons who received from the State of Vermont the charter of the defendant corporation had previously done, as individuals and a copartnership, those things

which they now do in a corporate capacity. But it is not those things that the corporation tax law touches. Were it so, the firm of Dwight Tuxbury & Sons would be within the law. The law, therefore, does not touch those natural rights which, being specified in the charter, are by virtue of permissive language in the charter sometimes termed a franchise or a secondary franchise, but it touches merely the real or primary franchise of being a corporation and acting in a corporate capacity which could be owned by the incorporators only by virtue of the charter from the State of Vermont.

The burdens of this law, therefore, falling on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity are, with equal certainty, burdens upon the right to be a corporation and to act as such. This is because the court always looks through the form to the substance and effect of the tax. We quote on this point both from the opinion of this Court and from one of the dissenting opinions in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 429 (1895). In this case Chief Justice FULLER said at page 581 :

"It is the substance and not the form which controls as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore



void. And Chief Justice MARSHALL said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice THOMPSON and Mr. Justice JOHNSON, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice MARSHALL delivering the opinion, overruled that contention.

"So in *Dobbins v. Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy v. California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co. v. Jackson*, 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the

security; and in *Cook v. Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S., 326, and *Leloup v. Mobile*, 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the same case (158 U. S., 601), Mr. Justice BROWN said at page 691 :

"Thus in *Brown v. Maryland*, 12 Wheat., 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston v. Charleston*, 2 Pet., 449, a tax upon stock for loans to the United States was held invalid as a tax upon the functions of the government; in *Dobbins v. Commissioners*, 16 Pet., 435, a State tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cases*, 7 How., 283, a tax upon alien passengers arriving in ports of the state was held void as a tax upon commerce; in *Almy v. California*, 24 How., 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall v. Nevada*, 6 Wall., 35, a tax upon railroads and stage companies for every passenger carried out of the state was held to be a tax on the passenger for the privilege of passing through the state; in *Pickard v. Pullman Southern*

*Car Co.*, 117 U. S., 34, a tax upon Pullman cars running between different states was held to be bad as a tax upon interstate commerce ; and in *Leloup v. Mobile*, 127 U. S., 640, a similar ruling was made with regard to a license tax for telegraph companies ; and finally, in *Cook v. Pennsylvania*, 97 U. S., 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable."

We think there can be no doubt that a court which has decided that an income tax assessed against persons in respect to the interest from their holdings in municipal bonds is an unconstitutional invasion of the sovereignty of a State because affecting its power to borrow will also decide that a tax levied solely on corporations is a burden on the franchises of corporations. It must be borne in mind, moreover, that the tax of one per cent of income over \$5,000 is but one of the burdens imposed upon the defendant corporation by this extraordinary law.

The burdens of the corporation tax upon the franchise of the defendant corporation are not to be likened to those taxes which States impose on corporate franchises of their own creation or on the privilege accorded to foreign corporations to do business within those States. The theory of such taxes we explain at length in the second point of this brief.

## B.

## STATE TAXATION OF FEDERAL INSTRUMENTALITIES.

We believe that until the year 1870 no Federal tax had been checked by this Court on the ground that it invaded the sovereignty of a State; but long before that date this Court was called on to declare and did declare that a certain State tax invaded the sovereignty of the United States. The case to which we refer is *McCulloch v. Maryland*, 4 Wheaton, 316, decided in 1819, and it is, as we think, the first case in which any tax, State or Federal, was declared in part unconstitutional for invading the sovereignty of the United States or one of the States. That case, while not involving a corporation tax and, therefore, not apposite in its facts to the case now before the Court, nevertheless furnishes the groundwork for the principle on which we rely. In that case the legislature of the State of Maryland on February 11, 1818, had enacted a statute providing in part, as follows :

“ *Be it enacted by the General Assembly of Maryland*, That if any bank has established, or shall without authority from the State first had and obtained, establish any branch, office of discount and deposit or office of pay and receipt, in any part of this State, it shall not be lawful for the said branch, office of discount and deposit, or office of

pay and receipt, to issue notes in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; *Provided always*, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the Treasurer of the Western Shore, for the use of the State, the sum of fifteen thousand dollars."

It will be perceived that this Maryland tax was not a tax on corporations, as such, or on corporate franchises. It applied to all banks and branches of banks, whether corporations, partnerships or individual bankers, carrying on the business of banking within the State of Maryland without having received permission from the State. It was, therefore, a tax on the doing

of a banking business to the extent that such business involved the issuing of notes.

There was then in existence the Bank of the United States, chartered by an Act of Congress, and having a branch in the State of Maryland. The Bank of the United States contested the question of its liability to this tax and brought the case to this Court. Before this Court the argument of Mr. Webster, Mr. Pinkney and the Attorney General of the United States in behalf of the Bank, the argument of Mr. Hopkins, Mr. Jones and the Attorney General of Maryland in behalf of the State of Maryland, and the opinion of this Court by the Chief Justice, dwelt on two main points: first, the power of the United States to incorporate the bank and, second, the power of the State of Maryland to impose the tax on the bank. It is the second point which particularly touches the case at bar.

The Supreme Court held that Congress, for the convenient exercise of the constitutional powers of the Government, might charter a bank and that such bank, being an instrumentality of government, could not be taxed in respect to its operations by one of the States. The substance of the decision is best summarized by Chief Justice MARSHALL himself, in his later opinion in *Osborn v. United States Bank*, 9 Wheaton 738, where he said in speaking of the earlier case at page 359:

“The foundation of the argument in favor of the right of a state to tax the bank, is laid in the

supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be ; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true ; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit ; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted ; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch vs. The State of Maryland*, 4 W.

316, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' "

Returning to the report of the case of *McCulloch v. Maryland*, 4 Wheat., 316, we quote from the opinion of the Court. Chief Justice MARSHALL said :

" That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied " (p. 425).

" On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations " (p. 426).

" The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. \* \* \* If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the



power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union " (p. 429).

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence* " (p. 431).

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government " (p. 432).

“ The power of taxation in the general and state governments is acknowledged to be concurrent ” (p. 435).

From these quotations we draw the principle of our argument : that a State tax so far as it invades the constitutional powers and sovereignty of the United States is void and that a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. It is quite independent of and perfectly consistent with the rule of supremacy of Federal laws made within the constitutional scope of the general Government.

It has been intimated that the opinion in *McCulloch v. Maryland* furnishes, in the quotation which follows, a ground of distinction between the Maryland tax on the United States Bank and the corporation tax on State corporations. The opinion says at pages 435-6 :

“ It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves,

are represented in congress and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents ; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole ; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But immediately thereafter the opinion says :

" But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States."

But both of these last quotations must be read in the light of the case then before the Court. The Maryland tax, as we have pointed out, was not a corporation tax. It was not a franchise tax. It was a tax on the business of banking. Hence the tax, if permitted to be levied

on the business of the United States Bank, would have been a burden on an agency of the Federal Government and a burden on the Government's constitutional powers exercised through constitutional means. The State banks, as Mr. Pinkney pointed out (p. 398), were not fiscal agencies of the States creating them and of course could be taxed by the United States by a general tax on the banking business. Moreover the Court was dealing with a case where total exemption from all State taxation on the business of the bank could properly be claimed. We are claiming no such exemption. The business of the defendant corporation in the case at bar is a purely private business like that described in the quotation from *Osborn v. United States Bank*, *supra*, and can be taxed by any Federal excise law which affects all persons and corporations doing a mercantile business and which is, therefore, not a franchise tax. But the Court never meant to suggest that a Federal tax on banks, falling solely on those which had been incorporated, could be sustained under the general power to tax. Such a tax would not have been "safe for the States and safe for the Union," because it would have invaded the power of the States—not in respect to an instrumentality or agency of government but in respect to a high prerogative of State sovereignty, to grant corporate charters. The Judge who said that a State could not tax a patent granted by the United States could not have believed

that the United States could tax a charter granted by a State. The Judge who said twice in the same opinion that the taxing power of the States and the United States were concurrent (pp. 425, 435) would not have decided that a State franchise could be taxed by Congress while a United States patent could not be taxed by a State.

Although the illustration of the operation of the whole upon the part as distinguished from the operation of the part upon the whole, caught from Mr. Pinkney's argument (p. 398), bears first blush plausibility as a sketch of our duality of sovereignty, it has not controlled this Court in a single case that we have been able to find where the suggestion has been made that while the States may not burden by tax the constitutional powers of the United States the Federal Government is free to tax the reserved powers of the States. The learned Justice who made the suggestion in *The Collector v Day*, 11 Wallace 113 at p. 128, was in a minority of one. It was repudiated by the majority opinion in that case and we have not seen it since in any reported case except one other dissenting opinion by the same Justice. If it were controlling, the line of decisions declaring the public securities of the States and their municipalities to be beyond the reach of Federal taxation would never have been made.

The case of *Osborn v. United States Bank*, 9 Wheaton, 738 (1824), we have already alluded to. It involved

the right of the State of Ohio to tax the Bank of the United States for operating in that State. The *Osborn Case* followed *McCulloch v. Maryland*, and decided that the bank was not subject to a tax under the Ohio statute of February 8, 1819, which provided specifically that if the Bank of the United States or any other should continue to transact business in the State it should be liable to an annual tax of fifty thousand dollars on each office of discount and deposit.

The rule of *McCulloch v. Maryland* and *Osborn v. United States Bank* was also applied to the institutions chartered under the National Banking Act and protects their business from State taxation except so far as their shares may be taxed in the hands of their stockholders by express consent of Congress.

The first case of conflict of power between a State and the United States with respect to taxing public securities arose in *Weston v. The City Council of Charleston*, 2 Peters, 449 (1829), when a municipal ordinance of Charleston, South Carolina, provided an income tax on "all personal estate, consisting of bonds, notes, insurance stock, *six and seven per cent stock of the United States* \* \* \* twenty-five cents upon every hundred dollars." This Court held that such a tax on the Government stock was void as a burden on the Government's power to borrow.

Chief Justice MARSHALL, referring to *McCulloch v. Maryland*, said at page 468 :

“ The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.”

The tax was held unconstitutional.

A case similar to the last came to this Court from New York, where the City of New York had included in an assessment against the capital of the Bank of Commerce its holdings of Government bonds. That was the case of *Bank of Commerce v. New York City*, 2 Black, 620 (1862). The decision, following the *Weston Case*, held the assessment void, and the opinion by Mr. Justice NELSON, speaking for the entire Court, is so clear in the enunciation of a principle that is vital in the case at bar that we quote from it at some length :

“ The result of this doctrine is, that the exercise of any authority by a State government trenching upon any of the powers granted to the general government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation ; and more than this, if the encroachment or usurpation to

any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power " (p. 633).

"The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the general government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of



that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true in respect to every other power or function of a government subject to the control of another " (Pages 633-4).

After quoting from Chief Justice MARSHALL's rule which is " safe for the States and safe for the Union " Mr. Justice NELSON thus concludes on page 635 :

" Each is sovereign and independent in its sphere of action and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

In the case of *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435 (1842), it appears by the agreed statement of facts that Captain Daniel Dobbins of the United States revenue cutter Erie had been assessed by the commissioners of Erie, Pennsylvania, for county taxes upon his office as commander of the cutter for the years 1835 to 1837 in the sum of ten dollars and seventy-five cents. It was argued in this Court that the assessment was invalid since it was on an office of the Government. This Court, by Mr. Justice WAYNE,

held the assessment void on the authority of *McCulloch v. Maryland* and *Weston v. City Council of Charleston* (both of which we have referred to), as a State tax on the constitutional means employed by the Government of the United States to execute its constitutional powers.

### C.

#### FEDERAL TAXATION OF STATE INSTRUMENTALITIES.

Up to this point we have mentioned no case in which the taxing power of the United States has been checked for trenching upon the sovereignty of a State and although no such case seems to have come before this Court prior to 1870, expressions frequently appeared in the opinions of the Court which naturally led up to the conclusion that an invasion of State sovereignty through Federal taxation must be checked for precisely the same reason that invasion of the United States sovereignty through State taxation must be checked. Some of these expressions follow :

In *Worcester v. Georgia*, 6 Peters, 515 (1832) Mr. Justice McLEAN, said at page 570 :

“ The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme ; and their sovereignty can be no more invaded by the action of the general government, than the action

of the state governments can arrest or obstruct the course of the national power."

In *Ableman v. Booth*, 21 Howard, 506 (1858), Chief Justice TANEY, speaking for the entire Court, said at pages 516, 519:

"The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." . . .

" 'this constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution" (p. 519).

In the *License Tax Cases*, 5 Wallace, 462 (1866), Chief Justice CHASE, speaking for the entire Court, said at page 470:

" But very different considerations apply to the internal commerce or domestic trade of the

States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

In *Pervear v. The Commonwealth*, 5 Wallace, 475, (1866), Chief Justice CHASE, speaking for the entire Court, said at page 479 :

" But the defense set up in the case before us is a very different one. \* \* \* \* It is founded on the general power to levy and collect taxes, *admitted on all hands to be concurrent only with the same general power in the State governments*; \* \* \* ."

In the year 1870, the case of *The Collector v. Day*, 11 Wallace, 113, came before this Court presenting practically the converse of the case of *Dobbins v. Commissioners of Erie County* (*supra*). The facts were as follows :

For the years 1866 and 1867 Joseph M. Day, Probate Judge for Barnstable County, Massachusetts, was assessed for the Federal income tax upon his salary as such judge. He paid under protest the tax for those

two years, amounting to \$61.50, and brought suit against the Collector of Internal Revenue to recover back the same. The case was argued on an agreed statement of facts in the Circuit Court of the United States for the District of Massachusetts, at October term, 1869, before Mr. Justice CLIFFORD and Judge JOHN LOWELL.

The question before the Circuit Court in Massachusetts was whether the principle of the cases heretofore cited in this brief applied to Federal taxation.

From the opinion of Mr. Justice CLIFFORD (reported in 3 Clifford, 376), we discover how he disposed of the argument in favor of the right of the United States to tax the salary of the State judge and applied the principles of *McCulloch v. Maryland*. He said at page 388:

“ Federal officers and the instruments and means of the Federal government, it is conceded, are exempt from State taxation, but it is denied that the Federal government is subject to any such implied prohibition, even in the case before the Court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the States which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived

that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties." \* \* \*

"The proposition of the defendant is in substance and effect that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." (Page 389.) \* \* \*

"Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. *Fifield v. Close*, 15 Mich., 505; *Warren v. Paul*, 22 Ind., 279, *Jones v. Keep*, 19 Wis., 369; *Union Bank v. Hill*, 3 Cald. (Tenn.), 325.

"Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, 'separate and distinct sovereignties, acting separately and independently of each other within

their respective spheres,' just as fully 'as if the line of division was traced by landmarks and monuments visible to the eye.' *Ableman v. Booth*, 21 How., 516; *McCulloch v. Maryland*, 4 Wheat., 429; *Austin v. The Aldermen*, 7 Wall., 699.

"Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create." (pp. 393-4.)

The case came before this Court on the appeal of the Collector of Internal Revenue, at December term, 1870, and was argued by the Attorney General of the United States on behalf of the appellant. (*The Collector v. Day*, 11 Wallace, 113.)

The opinion of this Court by Mr. Justice NELSON,



after asserting that the rule of *McCulloch v. Maryland* and *Dobbins v. The Commissioners of Erie* must apply, says at page 124:

“ It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: ‘The powers not delegated to the United States are reserved to the States respectively, or, to the people.’ The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

“ The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, ‘reserved,’ are as independent of the gen-

eral government as that government within its sphere is independent of the States.

“The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County v. Oregon* [7 Wall. 76]. ‘Both the States and the United States,’ he observed, ‘existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved.’ Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

“Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of govern-

ment, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws." \* \* \*

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality \* \* \*" (p. 126.)

The case of *The Collector v. Day*, remains the law and fully sustains the principle which we stated in the first part of this brief, viz : that a State tax, so far as it invades the constitutional powers and sovereignty of the United States, is void and that a Federal tax, so far as it invades the reserved powers and sovereignty of the States is equally void.

The principle is stated in *Railroad Company v. Peniston*, 18 Wallace, 5 (1873), in the following language at page 30 :

“ There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State Governments, *or embarrass their lawful action*, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government.”

This principle was applied in the case of *United States v. Railroad Company*, 17 Wallace, 322 (1872). In that case it appeared that the city of Baltimore

in the year 1854 had loaned to the Baltimore and Ohio Railroad Company \$4,500,000 to aid in the construction of the railroad. By section 122 of the Internal Revenue Act of 1864, as amended in 1866, it was provided that railroads (and various other companies) should pay out of earnings five per cent. on interest or coupons, dividends, etc. Under this law the United States demanded five per cent. out of the interest payable to the City of Baltimore on its loan. This Court, affirming the decision of the Court below, held that this tax could not lawfully be imposed on the City of Baltimore. By Mr. Justice HUNT the Court said at page 327:

“ The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

“ There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This

carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

The principle has also been applied to exempt municipal bonds from Federal taxation. In *Mercantile Bank v. New York*, 121 U. S., 138 (1886), Mr. Justice MATTHEWS said at page 162:

"Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States \* \* \* ."

The same principle made the income of municipal bonds free from the income tax of 1894.

*Pollock v. Farmers' Loan and Trust Company*, 157 U. S., 429 (1895), at pages 583-586, 601-603, 652, 653-4.

And in the case of *Plummer v. Coler*, 178 U. S., 15, (1900), these last cases are cited and quoted in such manner as to show beyond all doubt that this court now regards as completely reciprocal this re-

straint upon the general government and the States. In that case Mr. Justice SHIRAS said at page 117 :

“ It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston vs. Charleston*, 2 Pet., 449; *Bank of Commerce vs. New York City*, 2 Black, 620; *Home Insurance Co. vs. New York*, 134 U. S., 594, 598.

“ So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank vs. New York*, 121 U. S., 138; *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 583.

“ The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice NELSON in *Collector vs. Day*, 11 Wall., 113, 124 : ‘ The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme : but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, “ reserved,” are as independent of the general government as that government within its sphere is independent of the States ;’ and, as was said by Mr. Chief Justice FULLER, in *Pollock v. Farmers' Loan & Trust Company*, 157 U. S.,

537: 'As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.'"

## D.

#### OTHER CASES OF INVASION OF SOVEREIGNTY THROUGH TAXATION.

Lands owned by the United States are exempt from state taxes, as was held by this Court in *Van Brocklin v. Tennessee*, 117 U. S., 151 (1886). In *Ambrosini v. United States*, 187 U. S., 1 (1902), it was held that a stamp tax required by the War Revenue Act of the United States of 1898 could not be imposed upon a license required by the State of Illinois as a condition to the granting of a license to sell intoxicating liquors. In that case this Court, speaking by Chief Justice FULLER, said at page 7:

"The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assume the power to suppress such action. And considering license and bond



together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of City, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental."

The opinion in the case last cited refers to a number of decisions as authority, among them *Beltman v. Warwick*, 108 Fed. Rep., 46, decided by the United States Circuit Court of Appeals for the Sixth Circuit. In that case it was held that it was not within the power of Congress to require a revenue stamp to be put on a bond given by a notary public as a condition of his appointment to office by a State. The opinion by Mr. Justice LURTON, then Circuit Judge, concurred in by Mr. Justice DAY, then Circuit Judge, and by Judge SEVERENS, completely upholds the mutuality of the restraints upon the taxing powers of the National and State governments against invading the sovereignty of each other.

### E.

#### STATE TAXATION OF UNITED STATES PATENTS.

We next take up the subject of patents, the right to create and preserve which is vested by the Constitution

in the United States. Patents had their origin in royal grants as a part of the prerogative of the crown (*The Queen v. County Court Judge of Halifax* [1891], 1 Q. B., 793; s. c. affirmed [1891] 2 Q. B., 263; 1 *Robinson on Patents*, Sections 1, 10), and before the adoption of the Constitution were and still may be granted by the several States out of their own sovereignty (Chancellor KENT. in *Livingston v. Van Ingen*, 9 Johnson, 507 [1812], at pages 528, 530-1). In *McCulloch v. Maryland* Chief Justice MARSHALL, in a part of the opinion already quoted, scouted the idea that a State might tax a patent-right granted by the general government. He classed it with the mint and the custom house. It has been assumed in later decisions of this Court that a Federal patent-right could not be taxed by a State.

*Patterson v. Kentucky*, 97 U. S., 501, (1878).

*Webber v. Virginia*, 103 U. S., 344 (1880).

*Allen v. Riley*, 203 U. S., 347 (1906).

In other courts the point has been expressly adjudicated.

*In re Sheffield*, 64 Fed. Rep., 833 (1894).

*Commonwealth v. Westinghouse Mfg. Co.*,  
151 Pa. St., 265 (1892).

*The People ex rel. Edison Co. v. Board of Assessors*, 156 N. Y., 417 (1898).

And the decisions are placed, not on the ground that the making of the patented article or the vending of the patented article, or that the patented article itself is a means, instrumentality or agency of the United States,

but on the ground that the article derived its right to be a patented article from a grant or franchise from the United States. A patent is a franchise. The words of Chief Justice TANEY, in delivering the opinion of this Court in *Bloomer v. McQuewan*, 14 Howard, 539 (1852), make our meaning clear. He said at page 549:

“The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly and that monopoly is derived from, and exercised under, the protection of the United States.”

And as Mr. Justice CLIFFORD said in the case of *Seymour v. Osborne*, 11 Wall., 516 (1870), at page 533:

“Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.”

The whole subject of the origin and nature of a patent was quite fully discussed in the case of *The*

*Queen v. County Court Judge of Halifax (supra)*. That was an application for a writ of *mandamus* to require the respondent, as judge of the county court, to take jurisdiction of a suit for infringement of patent. He had declined to do so on the ground that the County Courts Act provided that such courts should not have cognizance of "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or *franchise*, shall be in question." In the Court of Queen's Bench Baron POLLOCK said:

"The right of the Crown to grant letters patent to a person for the sole use of any art first invented by him is a part of the ancient royal prerogative" (1 Q. B. [1891] p. 796).

Then reviewing the authorities for the definition of "franchise" (*Id.*, p. 797-8), he thus concluded:

"The result of these authorities is, in our opinion, that 'franchise' does include such a right as was put in issue by the proceedings in the county court" (*Id.*, p. 798).

Upon appeal Lord ESHER, Master of the Rolls, said:

"I agree with the judgment of the court below for the reasons that they gave, and I am prepared to say that the term 'franchise' in the County Court Act, 1888, includes a privilege granted by the Crown in respect to its prerogative, and that so a grant of a patent comes

within the exception, and the power of the county court to try a case involving the title to a patent is ousted by it." (2 Q. B. [1891], p. 266).

So also Lord Justice LOPES :

" In the second volume of Blackstone's Commentaries under the heading ' franchises ' I find ' franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' This would remove any doubt that I had, whether the term franchise included a patent, and if the case had to be decided merely on the construction of the County Courts Act, 1888, I think the jurisdiction of the county court would be excluded." (*Id.*)

Of course, by the Federal franchise of the letters patent the patentee gets no new right to make or vend the article embodying his invention. That right he has before the patent is applied for or granted. It is his natural right. As this Court, by Mr. Justice HARLAN, said in *Patterson v. Kentucky* (97 U. S., 501), at page 506 :

" The right to sell the Aurora oil was not derived from the letters-patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery."

It has therefore always been held that the mere fact that articles had been patented by a United States patent did not prevent the States from including the sale of such articles in their ordinary police or license regulations. That was the decision in the case last cited and also in the case of *Webber v. Virginia* (*supra*), and other cases following it.

It has been suggested that taxing a Federal patent differs from taxing a State corporate franchise, because the States granted to the Federal Government the power to issue patents, and therefore may not destroy the value of that grant by taxing the patents, while, on the other hand, the States retained their right to grant corporate franchises but subject to the general power of taxation which they had conferred on the Government. That is a perverted argument. It involves a breach of faith with the States and a violation of the compact under which the union was formed, and amounts to saying that what the States granted to the general government belongs to the latter by express grant, while what was reserved by the States may be wrested from them by the general government through the power to tax.

The exemption of Federal patent-rights from State taxation has a very significant bearing on this case. Suppose, for example, that the State of Vermont should enact a law providing that every person, firm or corporation owning any United States letters-patent should

pay a tax with respect to the carrying on or doing of any business protected by such letters-patent equivalent to one per cent. of the net income of such business. The State of Vermont would attempt to defend the statute on the ground that the State had the right to classify for purposes of taxation; that it had selected as a class certain favored persons and corporations who enjoyed Government monopolies; that the class so selected was, by reason of the monopolies enjoyed, well able to pay and that the tax was light. On behalf of the Government it would be answered that the power to grant patents was a constitutional power of the United States; that a tax upon a Federal patent was a tax upon a franchise granted by the United States out of its sovereignty, and therefore a tax upon a constitutional power of the general government and an invasion of its sovereignty, and that though the tax was light, the power to tax at all, if once admitted, would involve in the assessment of a heavier tax the power to destroy and to render useless the power to create.

There can be little doubt as to how this Court would decide such a case. We think there should be as little doubt if the conditions were reversed and the Court had before it the case of a Federal tax upon a State patent or State corporate franchise.

## F.

STATE TAXATION OF A FEDERAL CORPORATE  
FRANCHISE.

We now pass to another sort of franchise—the franchise to be a corporation and to act in a corporate capacity. Like the franchise of letters-patent, it comes to the citizen or subject as a crown prerogative or a prerogative of sovereignty. “The king has also the prerogative of conferring privileges upon private persons. \* \* \* Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers and immunities in their politic capacity which they were utterly incapable of in their natural.” (1 Bl. Com., Ch. 7, pp. 272-3.) “The king’s consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. \* \* \* The methods, by which the king’s consent is expressly given, are either by act of parliament or charter” (1 Bl. Com., Ch. 18, 472-3). “Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the king’s prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king’s grant \* \* \*. The kinds of them are various. \* \* \* It is likewise a franchise for a number of persons to be incorporated



" and subsist as a body politic; with a power to maintain perpetual succession and do other corporate acts.  
 \* \* \* " (2 Bl. Com., Ch. 3, p. 37).

" Franchises," said Chief Justice TANEY in *Bank of Augusta v. Earle*, 13 Peters, 519 (1839) at page 595, "are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State."

In view of the settled law that a State might not tax the franchise of letters patent granted by the United States, and in view of the fact that corporate franchises, like patent franchises, are granted out of sovereignty, it was inevitable that this Court should unanimously hold, when the great case of *California v. Central Pacific Railroad*, 127 U. S., 1, came before it, that the States were utterly without power to tax a corporate franchise granted by the United States. Defenders of the "corporation tax" have sought to lessen the scope of Mr. Justice BRADLEY's great opinion in that case by saying that it turned on the fact that the railroad was a federal agency and not on the fact that the tax was laid on a federal franchise. There is no justification for this. There is not a line or a word in the whole opinion that

gives color to that statement. The entire decision was placed upon the ground that the franchise "emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty" (127 U. S., 41). Justice BRADLEY did mention the public or national utility of the corporation, but the mention of that feature was quite subordinate to the main issue, and beside the real question of the power of the State to tax the franchise. Long before that case came before this Court it had been recognized that every great transcontinental railroad performed Government service in the transportation of mails, troops, etc., and was an instrumentality, to that extent, of the United States, and in establishing the fact that such a railroad was an instrumentality of the United States, it made not the slightest difference whether the railroad was chartered by the United States or one of the States. It would have been, therefore, a sheer waste of time for this Court to have pointed out in *California v. Central Pacific Railroad*, that the railroad had been chartered by the United States if the Court regarded the railroad as an instrumentality of the United States like the Bank of the United States, the National banks, the Government stocks and the Captain of the revenue cutter.

We have said that it was recognized that all trans-

continental railroads were carrying troops, mails, etc., and were to that extent, instrumentalities of the United States, and that it made no difference as to the power of the State to tax the property of such railroads whether they were incorporated by the United States or by a State. In support of this we quote from the opinion of this Court in *Railroad Company v. Peniston*, 18 Wallace, 5. Mr. Justice STRONG said at pages 33, 34 :

“ A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad.” \* \* \*

“ It is, however, insisted that the case of *Thompson vs. The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from

this to distinguish the case from *McCulloch vs. The State of Maryland*. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in *Weston vs. Charleston*, they cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature."

Mr. Justice STRONG, however, was careful to point out that the tax there under consideration was "*not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being*" (p. 37). The same rule has been followed in *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530 (1888), in which Mr. Justice MILLER incidentally pointed out (p. 549) that all railroads had been declared to be gov-

ernment post-roads. When, therefore, the case of *California v. Central Pacific Railroad*, 127 U. S., 1, came before this Court, it was settled law that property taxes on railroads employed as Federal agencies could be levied by the States irrespective of whether such railroads were chartered by the United States or by the States and the only questions before the Court were whether the State tax in that case was laid on a Federal franchise, and, if so, whether it could be lawfully laid. It appeared by Article XIII, section 10 of the Constitution of California, that "the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization \* \* \*." This language was followed by the legislature of California in framing section 3628 of the Political Code. The Central Pacific Railroad Company claimed that the State Board of Equalization had included in assessments against the company the value of the franchise or franchises granted to it by the United States and expressly alleged it was a Federal corporation holding its corporate power and franchises under the government of the United States. The Court below found that the assessment did include "the full value of *all* franchises and corporate powers exercised by the defendant."

Mr. Justice BRADLEY, after stating the Acts of Congress which related to the building of the Central Pacific Railroad or its predecessor, found that the Company possessed franchises granted by Congress. He

thus disposed of the question whether the State may tax them (Pages 40-1):

"Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com., 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always reduced by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the

legislature, direct or derived. These are franchises. No private person can take another's property even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch vs. Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

The foregoing extract from Mr. Justice BRADLEY'S opinion was quoted in full and with approval by this Court in the case of *Central Pacific Railroad v. California*, 162 U. S., 91 (1896) at pages 124-5, and it would seem to be settled law that a State cannot tax a franchise granted by the General Government.

### G.

#### FEDERAL TAXATION OF A STATE CORPORATE FRANCHISE.

We now pass to the precise question before this Court in the case at bar: May Congress impose a tax on a corporate franchise granted by a State?

We have shown that the granting of charters and franchises to corporations is a prerogative of the crown. Being such, it is owned by the States, as this Court, speaking by Mr. Justice McLEAN, said in the case of *Wheeler v. Smith*, 9 Howard, 55, 78 (1850):

"When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government."

Let us now consider some of the cases which may be cited on the side of the corporation tax. First is the case of *Veazie Bank v. Fenno*, 8 Wallace, 533



(1869). A dictum in *Veazie Bank v. Fenno* is the only authority referred to in the Senate debates as upholding the novel principle of this extraordinary tax. The decision in that case went upon the ground that to the United States belongs complete control over currency.

The *Veazie Bank* was a Maine corporation and had authority to issue bank notes for circulation. The Act of Congress of July 13, 1866, provided that

“Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue” (p. 539.)

The bank claimed that this law was unconstitutional on two grounds. The second was that “the act imposing the tax impairs a franchise granted by the State and Congress has no power to pass any law with that intent or effect” (p. 540); and the Court says at page 547 :

“Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect ?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

Consider the statute there before the Court. It was not a corporation tax. It was not aimed at corporations or payable by them because they were such. It included among those liable to pay the tax all banks—partnerships as well as incorporated companies (14 Op. Atty. Gen. 373)—and it was not levied on the banks or bankers in respect to their business as a whole or their franchise, right or privilege to do business. It was levied on property and affected a single thing that all banks and bankers had been accustomed to do, viz., to issue notes for circulation, whether such notes were the banker's own or those of some other person or bank. This feature was

perfectly understood by the Court and was dwelt upon, for Chief Justice CHASE said at page 547 :

“ But in the case before us the object of taxation is *not the franchise* of the bank, *but property created, or contracts made and issued under the franchise, or power to issue bank bills*. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets ; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts.”

And on pages 546-7 :

“ The tax under consideration is a tax on bank circulation.”

The dissenting Justices, Mr. Justice NELSON and Mr. Justice DAVIS considered that this tax upon bank circulation was equivalent to a tax on the reserved power of the States to create banks and therefore unconstitutional, and Mr. Justice NELSON said at page 555 :

“ As we have seen, in the forepart of this opinion, the power to incorporate banks was not

surrendered to the Federal Government but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them."

And on page 556:

"It is true, that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies, and others.

"This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and, within these limits, sustained and supported them as sovereign States."

These quotations, involving principles which we now urge, were not, we submit, denied by the majority

of the Court in *Veazie Bank v. Fenno*. The majority opinion expressly states that the tax was not on the franchise of the bank and admits that there may be cases in which a tax on a franchise granted by a State must be held unconstitutional, and that the reserved power of the States to pass laws *and to give effect to them through executive action* is beyond the reach of Federal taxation. That concession comes very nearly covering, if not quite covering, the case at bar. Surely the assertion that the Court cannot admit "that franchises granted by a State are necessarily exempt from taxation" does not necessarily include the franchise to create a corporation through the exercise of a crown prerogative. It may well be that such a franchise as the right of an individual or a firm or corporation to issue circulating notes as currency may not be exempt from Federal taxation any more than the right to buy and sell on the floor of an exchange or the right to transmit an estate by will or to take title under a will; but when the Court expressly states that the tax is not upon the franchise of the bank, *i. e.* the franchise to be a corporation and to act in a corporate capacity, we insist that no legitimate use of the case can be made as a precedent for the validity of the corporation tax of 1909.

The latter part of the opinion of the Court in *Veazie Bank v. Fenno* shows that the statute there under discussion may be sustained on the strength of the Govern-

ment's power to regulate currency. That this is probably regarded as the true ground of the decision may be gathered from the opinion of this Court in the *Head Money Cases*, 112 U. S., 580 (1884), where Mr. Justice MILLER, speaking for the entire Court, said at page 596 :

" In the case of *Veazie Bank v. Fenno*, 8 Wall., 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

So far as we have been able to ascertain, the case of *Veazie Bank v. Fenno* has never been referred to by this Court as sustaining the power of the United States to tax a State franchise to be a corporation.

It has been suggested that section 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909 and the decision of *Railroad Company v. Collector*, 100 U. S. 595 (1879) is referred to as sustaining the tax which was to be paid by "any railroad, canal, turnpike, canal navigation or slack water company." It is true

that individuals and partnerships were not mentioned by name in that section, but it is also the fact that the word "corporation" is not used. The Court seemed to think the tax an ordinary occupation tax on particular businesses.

The case of *Railroad Company v. Collector*, is not a precedent for the corporation tax of 1909. The statute there in question (Section 122 of the Internal Revenue Act of 1864, as amended in 1866) provided that the companies named must deduct from the payment on account of interest on bonds and of dividends on stock a tax on such interest and dividends, and the single question presented to this Court was whether this tax could be collected when the bondholders and stockholders were aliens. None of the constitutional questions arising in the case at bar was mentioned or even suspected of being involved in *Railroad Company v. Collector*. That the case is of no value in the present discussion appears from the first paragraph of the opinion where Mr. Justice MILLER says at p. 596 :

"As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, *the case is of little consequence as regards any principal involved in it as a rule of future action.*"

It is also important to notice that this Court in the case of *United States v. Railroad Company*, 17 Wall., 322, held that the tax imposed by the law under consid-

eration in *Railroad Company v. Collector*, 100 U. S., 595, was not a tax upon the corporation. In the head-note of the case it said that :

“ The tax provided for in the 122nd section of the Internal Revenue Act of June 30th, 1864, as subsequently amended \* \* \* is a tax upon the creditor and not upon the corporation. The corporation is made use of, but as a convenient means, of collecting the tax.”

It is not clear whether the construction of this statute of 1864 entertained by this Court in the case in *Wallace* is to prevail or the subsequent construction in the case decided in 100 U. S., but it is interesting to note that the subsequent case of *Railroad Company v. Collector*, 100 U. S., 595, makes no mention in the opinion of the prior case of *United States v. Railroad Company*, 17 Wall., 322.

The remarks on this case of *Railroad Company v. Collector* by Mr. Justice BRADLEY and Mr. Justice HARLAN (106 U. S., 703), as well as a dissenting opinion by Mr. Justice FIELD (106 U. S., 330-1), coupled with Mr. Justice MILLER's observations, already quoted, leave the case of *Railroad Company v. Collector* as no authority on any proposition.

Another case which has been thought pertinent by supporters of the corporation tax is *Nicol v. Ames*, 173 U. S. 509 (1899), where this Court upheld that provision of the War Revenue Act of 1898 requiring a mem-



orandum of every sale at any exchange or board of trade or other similar place and the affixing of a revenue stamp to such memorandum. The Court, after holding that such tax was not a direct tax, held that sales of that sort could be classified by themselves and apart from other sales and could therefore properly be selected for a special tax because of the obvious and peculiar privilege and facility of making a sale at a place where there was the best opportunity for a demand, a price, and dispatch in the transaction of business. It was conceded, however, that the privileges and facilities of exchanges were not created by the State, and, therefore, were not, in any sense, franchises created out of a crown prerogative. And in the opinion of the Court in *Nicol v. Ames*, Mr. Justice PECKHAM suggestively said at page 521 :

“If it were to be assumed that taxes upon *corporate* franchises or privileges may be imposed only by the authority that created them, it does not follow that *no* privilege or facility can be taxed which is not created by the government of a State or by Congress.”

We may therefore dismiss *Nicol v. Ames* as an authority in support of the corporation tax.

We shall next proceed to discuss the acknowledged power of Congress to tax the transmission of property under the State laws of wills and intestacy. The recognition of this power has been referred to as an argu-

ment to support a Federal tax on corporate franchises. The error arises from a failure to distinguish between the origin, ownership, transmission and receipt of property, on the one hand, and the creation of a corporation on the other.

Blackstone's chapter "of Property in General" (2 Bl. Com. Ch. I, p. 1) gives the origin of property. In the beginning all things were in common and the only property which an individual had therein was a kind of a transient property which, while he used the particular thing, was his by "the law of nature and reason." (*Id.*, p. 3.) When he left it, the thing became transiently the property of the next taker. "As mankind increased in numbers, craft and ambition it became necessary, in order to avoid innumerable tumults, to entertain the conception of more permanent dominion over things." (*Id.*, p. 4.)

"And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant: which bodily labour, bestowed upon any subject which before

lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." (*Id.*, p. 5.)

"And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it." (*Id.*, p. 8.)

"Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it. \* \* \*"  
(*Id.*, p. 9.)

Then mutual convenience introduced commercial traffic and transfer of property.

On the death of a person his property became that of the next immediate occupant, but for the peace of mankind "the universal law of almost every nation" has given to the dying person the right of disposing of his property by will, or, in case he makes no will, has declared who shall be his heir or successor (*Id.*, p. 10).

The right of children to inherit seems to have been recognized earlier than the right to make a will (*Id.*, p. 11), and the origin of their right to inherit seems prob-

ably to have arisen from their being naturally the persons who would be near their father's death-bed and therefore the next immediate occupants of his possessions (*Id.*, 11-12). In default of children a man's servants born under his roof become his heirs (*Id.*, p. 12). But the strict rule of inheritance made heirs disobedient and headstrong, defrauded creditors and sometimes prevented the wisest provision for the support of children. This caused the introduction of wills (*Id.*, p. 12).

In *United State v. Perkins*, 163 U. S., 625 (1876), this Court, by Mr. Justice BROWN, said at page 628:

" \* \* \* the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents. \* \* \* "

And in *Windham v. Chetwynd*, 1 Burr., 414 (1757), LORD MANSFIELD said at page 420:

" Let me observe that the power of devising ought to be favored.

" It is a natural consequence of property, and the right a man has over his own."

The foregoing citations are sufficient to show that property does not proceed from a sovereign power, nor is it created out of a crown prerogative. It is enjoyed by persons as a natural right. The right of disposing of it by will and inheriting it are also spoken of as

natural rights, though provided for and regulated by laws just as are the owning, sale and purchase of property. The State may say that the provisions of a man's will shall be respected and the State may say who are the heirs, but the State does not create the property which is transmitted. The transmission is occasioned by death and is not created by the State. The transmission would have occurred without any laws for wills or inheritances and the property would have gone by the old doctrine of occupancy to the first takers. There has never been any theory that upon a man's death his property dissolves, is absorbed by sovereignty and is re-created by sovereignty and vested in somebody else.

The transmission of property on the occasion of the owner's death, being an inevitable occurrence, can be taxed to any extent by the United States without preventing the transmission. The transmission arises from natural causes which are not controlled or regulated by governments and it is always bound to occur whatever the tax and by whomsoever the tax is imposed. On the other hand, corporate franchises are government creations; they may easily be taxed to extinction, and the granting of franchises may easily be prevented by the mere enactment of a tax statute.

If it were maintained that the transmission of a decedent's property was beyond the reach of Federal taxes

because regulated by State laws it would follow that property generally, since it is regulated in its ownership, use, sale, exchange and purchase by State laws, must also be beyond the reach of such taxes. This was the view taken by this Court in *Knowlton v. Moore*, 178 U. S. 41 (1900), and the subject was thus disposed of by Mr. Justice WHITE at page 59:

“ But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus,

imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

It is therefore held that the transmission of property through the death of its former owner, like the owning, buying and selling of property, is alike within the taxing power of the United States though within State regulation. It brings the transmission of a decedent's property to the same basis as the circulation of negotiable notes as currency, the selling of property, the trafficking in commodities at exchanges and boards of trade and all other privileges or rights which, though exercised under the permission and regulation of the States, may still be taxable by the United States. There is a perfectly clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create and a Federal tax on a corporate franchise created and granted out of State sovereignty.

In *Thomas v. United States*, 192 U. S., 363 (1904) the plaintiff in error had been indicted for omitting to stamp a memorandum of sale of some railroad stock as required by the War Revenue Act of 1898. He was convicted and appealed to this Court. The argument in this Court and the decision turned solely upon the question whether the requirement of affixing to the memorandum a revenue stamp imposed a "direct tax." This Court held that the tax was not a direct tax but an excise tax upon the sale, and the Court by the Chief Justice said at page 371 :

" The sale of stocks is a particular business transaction in the exercise of the privilege



afforded by the laws in respect to corporations of disposing of property in the form of certificates."

The case is, therefore, brought within the principle of the other cases where taxes have been imposed on the opportunity or privilege of doing some particular thing with or in respect to property such as issuing negotiable notes as currency, selling at exchanges or boards of trade, transmitting by will or through intestacy, etc. It was not argued and could not have been argued that the tax was a tax on a corporate franchise and the tax was not even limited to shares in corporations but included shares in "any association, company or corporation." Therefore every enterprise or property where separate interests were represented by shares was affected alike.

There is nothing in the case of *Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397 (1904), which supports the constitutionality of the corporation tax. That case arose under section 27 of the War Revenue Act of 1898, which provided "that *every person, firm, corporation or company* carrying on or doing the business of . . . refining sugar" should pay an annual excise tax equivalent to a certain per cent of the gross receipts. The tax was an ordinary occupation tax and the statute imposing it named the occupations taxed and imposed the tax on all persons engaged in such occupations. It

was argued that the tax was a direct tax on income. This Court held it to be an excise tax on a particular business and quite in line with *Pacific Insurance Co. v. Soule*, 7 Wallace, 433. The Corporation Tax Law mentions no particular business except insurance.

In *South Carolina v. United States*, 199 U. S., 437 (1905), it was held that the State dispensaries of South Carolina, although established by the laws of that State and authorized by the State as the sole dispensers of intoxicating liquors, must pay the internal revenue taxes imposed by the United States on liquor dealers. While not referred to in the opinion of the Court, the case of *Bank of the United States v. Planters' Bank*, 9 Wheaton, 904 (1824), was cited on the argument by the Solicitor General of the United States. In that case Chief Justice MARSHALL said at page 907 :

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted."

This reasoning seems very near that of the Court

in the *South Carolina Case*, for Mr. Justice BREWER says at page 463 :

“ It is reasonable to hold that while the former [the United States] may do nothing by taxation in any form to prevent the full discharge by the latter [a State] of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the Nation.”

Suggesting a similar line of thought Mr. Justice BREWER also said in the *South Carolina Case* at page 461 :

“ These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.”

By “ these decisions ” the Court meant the *Veazie Bank Case*, *The Collector v. Day*, *United States v. Railroad Company* and the *Ambrosini Case*, all of which have been discussed in this brief. Those cases are the only ones which the Court had immediately referred to in that connection. There is, therefore, no reason to suppose that the language of Mr. Justice BREWER was intended in any way to affect the rule exempting United

States letters-patent or United States corporate franchises from State taxation. That being so, the *South Carolina Case* expressly omits to touch the cases which are especially in point in the case at bar. Moreover, if we take the words of the Court "of a strictly governmental character" we would assume that they would as aptly fit the function of creating a corporation out of a crown prerogative as they would the appointment and payment of a judicial officer, the borrowing of money for public purposes, or the taking of a bond under the police power. The exercise of the crown prerogative in creating corporations is, we take it, one of the "ordinary functions" of State government, and we gather from the opinion of the Court that such functions are not to be trenched upon by Federal taxation. For the Court says at page 451 :

" But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. \* \* \*

" Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the *ordinary functions* of government, \* \* \* "

And as Mr. Justice BROWN, speaking for this Court in *Hale v. Henkel*, 201 U. S., 43, said at page 74 :

" The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public."

But there are further and very wide distinctions between the *South Carolina Case* and the corporation tax on the Stone Tracy Company.

The tax was laid on the South Carolina dispensaries not because they were empowered by the State, but because they dealt in liquors. The Corporation Tax Law falls upon the Stone Tracy Company because it is empowered by the State and not because it does a general mercantile business. In the *South Carolina Case* the tax was not upon the power of South Carolina to create the State dispensaries. In the case at bar the tax is upon the power of Vermont to grant and preserve a franchise to the defendant corporation. If, through lax enforcement of the South Carolina liquor laws, persons other than State agents sell liquor in South Carolina, such persons are required to pay the United States liquor taxes. On the other hand, in Vermont, individuals and partnerships engaged in the same business as the Stone Tracy Company are not subject to the corporation tax because they are not chartered by Vermont. We have but to refer to the official report in the *South Carolina Case* to find that in spite of the State statute confining the sale of liquors to the State dispensaries, the United States liquor taxes were collected from two hundred and sixty private dealers in the State. It is therefore clear that the two cases are not parallel, and that the principle of the *South Caro-*

*lina Case* is merely that a State, by entering the field of private business and engaging in a trade which has always been taxed by the United States, cannot use its sovereignty to avoid the tax which others in the same State and in other States are required by ancient Federal statutes to pay as a license on such trade.

To use the language of Mr. Justice WHITE in giving the opinion of the Court in a later case (*Murray v. Wilson Distilling Co.*, 213 U. S., 151, 173): "That case [*i. e.* the *South Carolina Case*] was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the Government of the United States."

The United States had always taxed the liquor business, and the tax had historic practice to support it. Moreover the claim of the dispensaries was that they were entitled to total exemption. In the case at bar no claim of total exemption is made. The Stone Tracy Company may be taxed under any Federal tax law which does not make the corporate franchise the test of liability. We fail to perceive any just ground for the claim that the *South Carolina Case* is an authority for the Corporation Tax.

We cannot be criticised for producing no case in which a Federal tax upon corporate charters has been declared unconstitutional, because until the enactment of the

extraordinary law now under consideration no such tax has been imposed by Congress. In one hundred and twenty-two years of legislation under the Constitution the Corporation Tax of 1909 is the first of its kind.

While we can produce no decision, we have shown the principle underlying all the decisions respecting infringement by taxation upon the sovereignty either of the Nation or of the States, and that principle as clearly forbids a Federal tax upon the States' exercise of crown prerogatives as it does a State tax upon a Federal franchise. If we run through the cases decided by this Court we find expressions, not decisions, it is true, but expressions indicating that in American jurisprudence the power to tax a corporate franchise rests only with the State which creates it. Thus: where Mr. Justice WOODBURY, in a concurring opinion (6 Howard, at page 548), spoke of a corporate franchise as a contract between the State and a corporation which "may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it"; where Mr. Justice SWAYNE said (15 Wallace, at page 296) that it was "not to be questioned that the States may tax the franchises of companies *created by them*"; where Mr. Justice BRADLEY (21 Wallace, at page 473) spoke of the "very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises,

and its corporations ;" where Mr. Justice JACKSON, then Circuit Judge (52 Fed. Rep., at pages 112-3) spoke of the right of Congress to place restrictions upon the rights of corporations created by its authority as distinguished from corporations created by the States ; or where the precise point was conceded for argument's sake in the opinion of Mr. Justice PECKHAM in *Nicol v. Ames*, already quoted.

And, though found in a dissenting opinion, we think the language of Mr. Justice BREWER in speaking for himself and the late Chief Justice accurately reflects the principle. He said :

"It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority."

*Hale v. Henkel*, 201 U. S., 43, 86.

We have shown, beyond the possibility of dispute, we think, that the burdens of the Corporation Tax Law fall on the franchise of the defendant corporation and on the franchise of every corporation. It follows irresistibly from this that the law puts the burden on the power of the States to create corporations. The mere phraseology used in the statute—"special excise tax with respect



to the carrying on or doing business"—counts for little as against the substance and effect when the constitutionality of the law is attacked.

*Pollock v. Farmers' Loan and Trust Co.*,  
157 U. S., 429, 580-1 (1895).

*Knowlton v. Moore*, 178 U. S., 41, 81 (1900).

*Spreckels Sugar Refining Co. v. McClain*,  
192 U. S., 397, 411 (1904).

As Chief Justice MARSHALL said :

" Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? "

*Craig v. Missouri*, 4 Peters, 410, 433 (1830).

So we cannot believe that this Court will permit the plain language of the Tenth Amendment to the Constitution to be evaded by a device which clothes an invasion of State sovereignty in a new name.

We submit that among the "ordinary functions" of State government is the creation of corporations, and that the exercise of a prerogative of sovereignty in creating them is "strictly governmental". If it is not essential to the existence of the States in the measure of independence guaranteed them

by the Constitution that this function should remain unimpaired, it is for the States so to decide in a constitutional manner. Possibly, on the submission of a constitutional amendment giving Congress power to tax the franchises of State corporations, the States might grant it, but until they do so it is not consistent with our frame of government and duality of sovereignty to presume on such consent.

The invasion of State sovereignty through the corporation tax is actual and real. It is not mere assertion of a conclusion by the pleader that if this defendant corporation discloses to its competitors its private affairs and is liable to a tax of this sort it will have to surrender its charter. No person of the slightest business experience can doubt that the imposition of the tax and the forced publicity of corporate affairs as distinguished from the privacy of the affairs of partnerships and individuals and their exemption from a like tax will drive to the wall this defendant corporation and all similar small corporations which compete with partnerships and individuals. It may not seriously affect the larger and stronger corporations with which the investor is familiar, but it is beyond peradventure that the small corporations which live surrounded by competitors will be extinguished by this devastating law if this Court permits the law to stand. There never has been a better illustration of the truths that the power to tax involves

the power to destroy and that the power to destroy may render useless the power to create. All the reserved power of the States to create these small corporations would be rendered as useless as if it never had existed.

It is no answer to say, as the directors of the defendant corporation have said, that a copartnership may be formed to take over the assets of the Stone Tracy Company. That company, as a corporation, as a body created by the State of Vermont, is threatened with extinction through the enforcement of a Federal statute and it would be absolutely frivolous to suggest as a defense of the statute that the assets of the corporation could be saved from the wreck and turned over to another concern.

In this case, then, the operation of the law would result in confiscation instead of taxation.

*"For taking away our charters"* was one of the grievances of the American colonies against the King of Great Britain. At the time the Declaration (containing these very words) was written the people of Vermont had already rendered conspicuous service in the war for independence. It would be an astonishing result if, years after that independence had been won, it should be found that the government established by the colonies themselves had become an instrument "for taking away our charters".

The decision which we ask this Court to make involves no diminution of the potential resources of the National government. A result of that nature harassed the thoughts of some of the members of this Court when the Income Tax Cases were pending. This is no such case. The taxing power of the Federal government may reach the business of the defendant corporation for two per cent, for ten per cent, for fifty per cent, if necessary, if it will but seek out all who are engaged in the same business and not attempt to tax the corporate franchise. It is that attempt by Congress to tax a franchise created by the State and not the general power to tax that makes this argument.

We summarize our argument in support of the proposition that the general government cannot tax the franchise of a State corporation thus :

FIRST: A State cannot tax an instrumentality of the Federal government (*McCulloch v. Maryland*, 4 Wheaton, 316; *Osborn v. United States Bank*, 9 Wheaton, 738; *Weston v. City Council of Charleston*, 2 Peters, 449; *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435; *Bank of Commerce v. New York City*, 2 Black, 620).

SECOND: For the same reason, and because a State is as independent a sovereignty within its sphere as the National government, Congress cannot pass any

law taxing an instrumentality of a State (*Collector v. Day*, 3 Clifford, 376; s. c. 11 Wallace, 113; *United States v. Railroad Company*, 17 Wallace, 322; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S., 429).

THIRD: The Federal Courts have assumed, and the highest State Courts have decided, that a State cannot tax patents granted by the general government (*McCulloch v. Maryland*, 4 Wheaton, 316; *Patterson v. Kentucky*, 97 U. S., 501; *Webber v. Virginia*, 103 U. S., 344; *Allen v. Riley*, 203 U. S., 347; *In re Sheffield*, 64 Fed. Rep., 833; *Commonwealth v. Westinghouse Co.*, 151 Pa. St., 265; *The People ex rel. Edison Co. v. Board of Assessors*, 156 N. Y., 417). A patent is a franchise (*Bloomer v. McQuewan*, 14 Howard, 539), that can be granted concurrently by both the State and the United States (*Livingston v. Van Ingen*, 9 Johnson, 507; 1 *Robinson on Patents*, Section 45), and is clearly not an instrumentality of either State or Federal government.

FOURTH: This Court has held that a State cannot tax the franchise granted to a Federal corporation, and the decision is placed not upon the ground that the corporation is an instrumentality of the Government, but because the franchise "emanates from, and is a portion of, the power of the Government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government, and re-

pugnant to its paramount sovereignty" (*California v. Central Pacific Railroad Co.*, 127 U. S., 1, 41).

FIFTH: Inasmuch as the principle of the decision that a State cannot tax a Federal instrumentality was held to apply when the question was reversed and Congress undertook to tax a State instrumentality, it would seem to follow that the reasons and principles for the decision that a State cannot tax a Federal corporate franchise would also apply to an attempt by the general government to tax a corporate franchise granted by a State.

We close this point with quotations from opinions of this Court which fully cover the field of this argument.

"It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the general government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of State legislation, renders them liable." (Opinion of the Court by Chief Justice FULLER in *Central Pacific Railroad v. California*, 162 U. S., 91, 122, quoting from dis-

sending opinion of Mr. Justice BRADLEY in *Railroad Co. v. Peniston*, 18 Wallace, 5, 48).

"Every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." (Opinion of the Court by Mr. Justice SWAYNE in *Farrington v. Tennessee*, 95 U. S., 679, 685.)

"That principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency." (Opinion of the Court by Mr. Justice FIELD, in *Wisconsin Central Railroad v. Price County*, 133 U. S., 496, 504.)

"In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." (Opinion of the Court by Mr. Justice BREWER in *Matter of Heff*, 197 U. S., 488, 505.)

## **SECOND POINT.**

**The defendant corporation would be deprived of its property without due process of law.**

We have shown that the Corporation Tax Law, if it is found to impose in substance a tax on the franchise of the corporation (whether it take the form of a franchise tax, a license tax, an occupation tax or any other species of tax or excise), must be declared an unconstitutional invasion of the sovereignty of Vermont. While we believe that the Court will find the law to be unconstitutional on that ground, nevertheless if there can be a judicial conception of the Corporation Tax Law which attributes to a cause other than the existence of the franchise and the corporate capacity the liability of the defendant corporation to the burdens of this statute, or if, as we believe, corporate capacity is the cause of liability, we propose showing that the statute, however construed, would deprive the defendant corporation of its property without due process of law.

In taking up this branch of our argument we assert that no justification for this tax is to be derived from any analogy to State corporation taxes. The relation of the States to corporations is different from the relation of the United States to the defendant corporation. A State grants a corporate charter, and it may impose on that charter such conditions to the grant, whether in the form of taxes or otherwise, as it sees fit. The



State, also, has the power of excluding from its borders any foreign corporation, and may impose upon foreign corporations, as a condition to being allowed to do business and exercise their corporate franchises within the State, any tax or other burden. A brief examination of some of the decisions of this Court will disclose full support for what we have stated.

Franchise taxes imposed by States on corporations created by such States have frequently been considered and sustained by this Court.

*Society for Savings v. Coite*, 6 Wallace, 594 (1867).

*Provident Institution v. Massachusetts*, 6 Wallace, 611 (1867).

*Hamilton Company v. Massachusetts*, 6 Wallace, 632 (1867).

*Home Insurance Co. v. New York*, 134 U. S., 594 (1890).

And we understand that the true theory upon which a State may tax a franchise granted by it is that stated by Mr. Justice FIELD in *Home Insurance Co. v. New York*, 134 U. S., 594, 600 (1890):

“The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied by such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or

month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The States also for years have been requiring the payment of license fees from foreign corporations as a condition of the right to do business or to exercise their corporate franchise within such States. These license fees are not franchise taxes. They are the price which the States, having the right to exclude foreign corporations altogether, may exact for the privilege of entering such States and doing business therein. The theory upon which these license fees are exacted is stated by the same learned Justice.

In *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 181 (1888), Mr. Justice FIELD, said at page 186:

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employes; nothing more and nothing less;" \* \* \*

And in the case of *Horn Silver Mining Co. v. New York*, 143 U. S., 305 (1892), he said at page 315 :

" Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient ; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges."

See also to the same effect :

*Maine v. Grand Trunk Railway Co.*, 142 U. S., 217, 227-8.

Neither the reason of the State franchise taxes nor of the State license taxes on foreign corporations can support the constitutionality of the Federal corporation tax on the defendant corporation ; for the defendant corporation was not created by the United States nor has the United States the right to say it shall not do business in Vermont in a corporate capacity.

We understand that the only thing that would prevent the State corporation tax laws from being held to deny to corporations the equal protection of the laws is that the State itself granted the charter and may prescribe the conditions under which it is enjoyed. In

*Berea College v. Kentucky*, 211 U. S., 45, Mr. Justice BREWER said at page 54 :

"In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.' \* \* \* \* Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State."

Congress, then, in classifying corporations as the objects of a special corporation tax assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. We submit that there is none and that every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. The defendant corporation in its business of dealing in merchandise pursues the same methods as the firm of Dwight Tuxbury & Sons. It buys for cash or on credit in the same way as the firm.

Precisely as the firm, it endeavors to sell at a profit for cash, or credit, or for commodities. No drummers selling goods in Windsor could perceive any essential difference between the shops of Dwight Tuxbury & Sons and the Stone Tracy Company. No customer in buying goods in Windsor could see any essential difference between the two shops. They are, to all intents and purposes, of the same class. To subject one and not the other to a tax "in respect to the carrying on or doing business" seems the extreme of arbitrariness.

We quote from the opinion of this Court in two cases. In *Kansas Pacific Railroad Co. v. Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S., 414 (1884), Mr. Justice FIELD, speaking for the entire Court, said at page 415:

"A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution."

And again, the same learned Justice in *McKinley v. Wheeler*, 130 U. S., 630 (1889), speaking for the entire Court, said at page 633:

"They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution."

Therefore for Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. We think that our position is well stated by Mr. Justice FIELD's concurring opinion in *San Bernardino County v. Southern Pacific Railroad Company*, 118 U. S., 417 (1886), where he was discussing the quite analogous case of a State's denying the equal protection of the laws to a corporation in the method of valuing property for taxation. He said at page 422:

"I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in

their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from consideration when it is owned by them, and considered when it is owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

We say that classifying corporations by Congress for the imposition of Federal taxes and other special burdens takes their property without due process of law and without just compensation in violation of the Fifth Amendment.

What is "due process of law"? It is process which accords with those "immutable principles of justice which inhere in the very idea of free government" (*Holden v. Hardy*, 169 U. S., 366, 389), which proceeds "from laws operating on all alike and not subjecting "the individual to an arbitrary exercise of the powers "of government unrestrained by the established principles of private rights and distributive justice" (*Leeper v. Texas*, 139 U. S., 462, 468). These principles have been stated time and again in the opinions of this Court from the case of *Bank of Columbia v. Okely*, 4 Wheaton, 235, 244, to the case of *Twining v. New Jersey*, 211, U. S. 78, 101-2.

Congress must conform to these principles in the passage of every law. As Mr. Justice CURTIS, speaking for the entire Court in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 Howard, 272 (1855), said at page 276:

"But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."



The defendant corporation is entitled to the protection of this constitutional safeguard for, as Chief Justice WAITE said in the *Sinking-Fund Cases*, 99 U. S., 700, at page 718, the United States "equally with the States" are prohibited from depriving persons *or corporations* "of property without due process of law."

The limitations on the powers of Congress to levy and collect taxes are not alone in those provisions of the Federal Constitution which relate exclusively to taxation. As Mr. Justice FIELD said in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 599 :

"There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations \* \* \* of its powers arising out of the essential nature of all free governments ; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations."

We therefore say that the arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporation and wholly exempting its business competitor from every one of them is not due process of law. We weigh the situation by the opinions of this Court.

In *Ballard v. Hunter*, 204 U. S., 241 (1907), Mr.

Justice McKENNA, quoting with approval from Mr. Justice BRADLEY, said, at page 255 :

“In judging what is ‘due process of law,’ respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be ‘due process of law,’ but if found to be arbitrary, oppressive and unjust it may be declared to be not ‘due process of law.’”

The arbitrary discrimination against the defendant corporation would surely be a denial of the equal protection of the law if the language of the Fourteenth Amendment applied to an act of Congress.

In *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283 (1898), Mr. Justice McKENNA said at page 294 :

“‘Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,’ said Mr. Justice BRADLEY, in *Bell’s Gap Railroad v. Pennsylvania*, 134 U. S., 232, 237.

“And Mr. Justice BREWER, in *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S., 150, 165, after a careful consideration of many cases,

said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'

It seems as if the case at bar furnished the strongest possible instance of where "a tax law directly necessarily and intentionally creates an inequality of burden," to quote the expression used by Mr. Justice BREWER in his dissenting opinion in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., at page 301, and that in his language "it becomes imperative to inquire "whether this inequality thus intentionally created can "find any constitutional justification."

The denial of equal protection of the laws and the taking of property without due process of law are, so far as this case is concerned, the same thing, because the injury complained of lies in the enforcement of a statute which is unequal and arbitrary. As the late Chief Justice FULLER said in speaking for the entire Court in *Duncan v. Missouri*, 152 U. S., 377 (1894):

"Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U. S., 150 (1897), it appears that a Texas statute provided that if claims on contract or in tort against railroad corporations were not promptly paid, the plaintiffs suing thereon and obtaining judgment for the full amount, might add thereto an attorney's fee of ten dollars. "The single question in this case is the constitutionality of the act allowing attorneys' fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law" (pp. 152-3). Railroad companies alone were subject to the burdens of the statute.

The Court pointed out that classification of railroads for certain purposes was just; as, for example, for fencing tracks, or for the use of safety-couplers (pp. 158-9), but that every lawful classification "must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" (p. 155). And Mr. Justice BREWER, in delivering the opinion of the Court, also said, at page 159:

"The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection

of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

“ But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this Court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: ‘ When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.’ The first official action of this nation declared the foundation of government in these words: ‘ We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.’ While such declaration of principles may not have the force of organic law, or be

made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

\* \* \*

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection" (pp. 165-6).

It was held in the *Ellis Case* that to compel a corporation to pay an attorney's fee to a plaintiff who was successful in a case against it, and not to require an individual defendant to pay an attorney's fee under the same conditions, was as arbitrary, and unfair, and unequal, and unjust as to compel a white defendant to do so and not require a black defendant to do so. In other

words, a corporation was placed precisely on the same basis as an individual.

Now the taxing power of the Federal Government (if this tax is to be deemed an excise or occupation tax, which we deny) is to be exercised on the people doing business in the United States, that is, on the business done in the United States. The business of this country is done by the people either in an individual capacity, or in a partnership capacity, or in a corporate capacity, and the selection for taxation of one class out of all the people doing business in this country is, we submit, class legislation and unequal.

If the Federal Government in laying this tax had imposed it alone on people doing business in this country in an individual capacity, would there be much doubt in anybody's mind but that the selection for taxation of individuals alone would have been arbitrary and unequal and a deprivation of their property without due process of law ?

If the taxing power had selected for taxation from all the people doing business in this country only those doing business in a partnership capacity, would such a discrimination have been deemed a lawful classification, and one which rested "upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed" ?

Now if the selection, for taxation by the general government from all the people doing business in this

country, of only those who do business in an individual capacity, or of only those who do business in a partnership capacity, is arbitrary and unlawful, then it must follow that the selection for taxation of those alone who do their business in a corporate capacity is equally arbitrary and unjust; for under the decision of the *Ellis Case* the corporation and the individual stand on the same ground so far as in this country there rests on Congress and State legislatures the obligation to make equal laws.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary. No such extraordinary claim has ever been or ever will be made. With the concession that a federal law which deprives a man of his property is arbitrary and unequal, it follows that such law deprives him of his property without due process of law, and is in clear violation of the provisions of the Fifth Amendment to the Constitution.

The Fourteenth Amendment to the Federal Constitution is but declaratory of the law as it had long existed. There was nothing new in it and the provision as to the equal protection of the laws was simply a restatement of an old idea.

As long ago as 1778 Sir William Meredith speaks



of the importance of equal laws in his work entitled —“ Historical Remarks on the Taxation of Free States ” (published in 1778), as follows at p. 39:

“ If many a page in the history of worldly interest and ambition did not prove the fact, it would be thought incredible that, in a country of liberty, men can be found ready to promote measures that tend to destroy that property in equal laws, which constitutes the best part of a free man’s inheritance.”

This provision of the Fourteenth Amendment as to equal laws was undoubtedly already covered by the previous clause in the same amendment forbidding a State to deprive any person of his property without due process of law, but was added to the amendment out of abundant caution, just as in the Fifth Amendment we find the clause, “ nor shall private property be taken for public use, without just compensation,” but do not find such clause in the Fourteenth Amendment.

The argument that, because such clause was omitted from the Fourteenth Amendment, therefore a State could take a man’s property for a public use without just compensation has never been sustained by this Court, but it has been held that any State which undertakes to take property for a public use without just compensation deprives a man of his property without due process of law, and is therefore restrained from so doing by the

provision of the Fourteenth Amendment that no State shall deprive any person of property without due process of law. *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U. S., 226, 241.

We simply apply the principle of the decision just cited and insist that the omission from the Fifth Amendment of the provision as to the equal protection of the laws does not give the right to Congress to pass an unequal and oppressive law, as such a law would in effect take property without due process of law and is clearly forbidden by the provision of the Fifth Amendment which says that no person shall be deprived of property without due process of law.

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79 (1901), this Court unanimously held that a Kansas statute which purported to regulate rates and other matters at stock yards transacting above a certain amount of business, and which statute in reality touched only the defendant, denied to the defendant the equal protection of the laws.

Mr. Justice BREWER said at page 111:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in

the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540 (1902), this Court held that the Illinois statute prohibiting illegal combinations in business was unconstitutional because it discriminated against certain classes of industry. The character of the statute is well illustrated by the following extract from the opinion of the Court by Mr. Justice HARLAN at page 564 :

"Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against com-

binations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

" We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

In the two latter cases the majority of the Court expressly reserved the question whether the unconstitutional features of the statute there under consideration would not also work a taking of property without due process of law.

In these cases the Court mentions a theory that in tax statutes the States are permitted a more unbridled latitude in discriminating or in "classifying" as it is called. This distinction Mr. Justice McKENNA in his dissenting opinion in the case last cited (p. 570) seemed

to deny; and the opinion of the Court in *Cox v. Texas*, 202 U. S., at pages 450-1, seemed to question its existence; but whether it really exists or whether its existence rests on any permanent and logical foundation, it seems clear that even in tax statutes the Federal Constitution cannot be utterly disregarded. The language in one of these tax cases—*Bell's Gap Railroad v. Pennsylvania*, 134 U. S., 232—has already been quoted. That case clearly indicates the law to be that "clear and hostile" discrimination against a class, especially such a discrimination as is "unusual" or "unknown," would render any tax statute unconstitutional, while discrimination which proceeds "within reasonable limits and general usage" would be sustained. While in that case the lawmaking power was the same power as that creating the corporation which was taxed, we ask no greater protection than what this Court thus intimated could be afforded under the Federal Constitution. The "corporation tax" declares a discrimination "clear and hostile" upon companies which owe the general government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." We have shown that it does not proceed within "reasonable limits," for in the reason of things there is no basis for the discrimination; and as for be-

ing within "general usage," the fact that it was hitherto unknown condemns it upon that ground.

So in many of the recent tax cases where the tax was sustained and where the right of the State to classify was admitted, it was clearly intimated that the protection of the Federal Constitution still exists where due process and equal protection of law is denied. For instance, in *American Sugar Refining Company v. Louisiana*, 179 U. S., 89, 92, it was said that "arbitrary, oppressive or capricious" discrimination would deny the equal protection of the laws; and in *Billings v. Illinois*, 188 U. S., 97, 101, it was said that "classification must be based on some reasonable ground."

We therefore are safe in saying that if statutes respecting taxation are entitled to looser treatment than other statutes in testing their constitutionality, there are still clearly the requirements that such statutes must not discriminate on unreasonable grounds and must not be oppressive or arbitrary. These requirements the Corporation Tax Law completely disregards.

The latest utterance of this Court on the subject is found in *Southern Railway Company v. Greene*, 216 U. S., 400, where it was held that a statute of Alabama requiring a foreign corporation, authorized to do business in the State, to pay a special tax denied to such corporation the equal protection of the laws, for the reason

that domestic corporations "owning the same character of property and carrying on the same kind of business" were not required to pay a similar tax. In the course of his opinion Mr. Justice DAY said at pages 417, 418 :

" We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal protection of the laws.

" It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real

and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf Colorado & Santa Fe Ry. v. Ellis*, 165 U. S., 150, 155, 165; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., 79; *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domes-



tic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

If a law selecting for purposes of taxation foreign corporations out of all the corporations doing business in a State is deemed arbitrary and an unwarranted classification because one corporation is taxed and another "owning the same character of property and carrying on the same kind of business" is not, it is difficult to see why the imposition of a tax upon a corporation and the exemption from taxation of a partnership "owning the same character of property and carrying on the same kind of business" is not equally arbitrary and unequal.

### **THIRD POINT.**

**The Corporation Tax Law is unconstitutional because it takes property for public use without just compensation.**

We further say that the Corporation Tax Law is unconstitutional because taking private property for public use without just compensation. We do not

refer especially to the one per cent collected on the net income of five thousand dollars or to the incidental extinction of the corporate franchise, but rather to the peculiar requirement of Subdivision 6 of the Corporation Tax Law which says that the returns "*shall constitute public records and be open to inspection as such.*"

Under the provision quoted the Stone Tracy Company's debts, its gross income, its dividends received, its expenses, rentals and franchise payments, its losses, its allowances for depreciation, its interest paid on its indebtedness, its taxes and its net income become publicly known. Thus that property which the defendant corporation has in the privacy of its affairs, in keeping to itself the contents of its books, papers and accounts and its trade secrets, is not only invaded but destroyed. Such property is, we take it, of a kind of which the Federal Constitution was designed to take most jealous care, for the Fourth Amendment provides that the right to such property shall not be violated by unreasonable searches and seizures.

We desire to impress upon the Court that the publicity of the returns under the Corporation Tax Law is not required for the purpose of imposing the tax. After the assessment is made, and the Government has entirely finished with the returns, then they are to become for the first time public records open to inspection. Even if no tax is levied by the Commissioner of Internal Revenue, because there is no income in excess

of five thousand dollars, yet the return is still required to become a public record open to inspection. All tax laws require full returns to be made for the information of the Government to be used in laying the tax, but no law that we know of ever before provided that when the Government had imposed the tax, and finished with the returns, they should then be made public property.

This property is not only taken, but it is taken without just compensation and for no cause which stands in legitimate relation to the power to tax. Manifestly, the exposure to the public of the contents of the defendant corporation's return, after the assessment is made and falls due, can in no way enhance the public revenues. It is an arbitrary and wholly independent action on the part of the government, visitatorial and disciplinary in its nature, and not, in any sense, for revenue purposes.

There is no question that a corporation is protected under the Fifth Amendment against the taking of its property without just compensation.

*Monongahela Navigation Co. v. United States*, 148 U. S., 312 (1893).

And in the case of *Hale v. Henkel*, 201 U. S., 43 (1906), Mr. Justice BROWN, in delivering the opinion of the Court, said at page 76:

"We do not wish to be understood as holding that a corporation is not entitled to immu-

nity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

#### **FOURTH POINT.**

**The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned.**

We believe that we have shown beyond doubt that this tax is laid upon the defendant corporation in respect to its franchise to be a corporation and to act in a corporate capacity. We shall now proceed to show that it is also a direct tax.

We do not need to weary the Court with the earlier cases decided by this Court on the question of direct and indirect taxation, but we shall start with the assumption that a tax on personal property may be a di-

rect tax within the decisions in the Income Tax Cases of 1895.

*Pollock v. Farmers' Loan and Trust Co.*,  
157 U. S., 429; S. C., 158 U. S., 601.  
*Nicol v. Ames*, 173 U. S., 509, 520.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

*California v. Central Pacific Railroad*, 127  
U. S., 1, 41-42.

A franchise cannot be regarded as an article of consumption like manufactured tobacco. It is not intended for consumption or sale. Therefore a tax on a franchise cannot be imposed on it at a period intermediate the commencement of its manufacture and the final consumption of the article within the rule of *Patton v. Brady*, 184 U. S., 608. The tax cannot be avoided by the owners for the time being through a subsequent sale or consumption of the franchise and so become an indirect tax. It remains distinctly of the nature of a capitation or other

direct tax. It is, as stated by Professor Beale in his work on Foreign Corporations, "in the nature of a poll tax."

*Beale on Foreign Corporations, Sec. 508, p. 665.*

So Judge GARRISON in the case of *The Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 529, 537, said in speaking of the New Jersey franchise tax :

"It is in short a poll tax levied upon domestic corporations for the right to be."

Those taxes which are paid by an individual or a corporation for the right or privilege to do this or that thing or to engage in this or that business are, admittedly, indirect taxes. They do not include, however, a tax on the right to live or the right to be. Such a tax, which is properly called a poll tax, has always been classed as a direct tax and we see no difference in principle between the poll tax on the individual for the right to be and the poll tax on the corporation for the right to be. The right or privilege of existence, whether in the corporation or the man, is not such a right or privilege as may be made subject to an indirect or excise tax. Any tax when placed on the right of the man or the corporation to live is a capitation tax and as direct as any tax can possibly be. The measurement of such a tax by the income from the man's business or the cor-

poration's business cannot alter the true nature of the tax.

We therefore submit that the Corporation Tax imposes a direct tax on the franchise of the defendant corporation.

### **FIFTH POINT.**

**The inclusion of joint-stock companies within the terms of the statute does not affect the argument in the previous points.**

We have treated the statute in our argument as if it were literally a corporation tax. That the substance and spirit of the law is to impose a corporation tax we think there can be no room for doubt; but included in the phrasing of the statute is also "every \* \* \* joint-stock company or association \* \* \* now or hereafter organized under the laws of the United States or of any State, \* \* \* ."

In this country joint-stock companies are quite unusual. Whether their precise number, all told, is six or sixty is immaterial, but except for two or three of the larger express companies we presume that most American lawyers have no practical acquaintance with joint-stock companies or associations. In some cases these companies or associations are considered as partnerships, in others they are considered as corporations.

But under whatever name they may go we think that if a company consists of a voluntary association, without deriving from public authority any rights which the members could not have exercised in their natural and individual capacity, that company is a partnership, while, on the other hand, if through public authority the association becomes vested with rights, privileges or franchises which the members could not have enjoyed as individuals or as an ordinary partnership, then the company partakes of the nature of a corporation and virtually is such.

It is quite clear, apart from the wording of the Corporation Tax Law, that the framers of the law never intended it to apply to a partnership of any kind, for a few hours before the passage of the Corporation Tax amendment this colloquy occurred in the Senate :

“ Mr. Brandegee : Does the Senator desire to answer my inquiry as to whether the matter of imposing a tax upon partnerships was considered at all by the committee ?

“ Mr. Aldrich : I will say that it was considered, and the committee thought it raised a cloud of questions which they did not care to discuss or to dispose of ” (44 Cong. Rec., 4028).

But the statute itself disposes of the question by selecting only such joint-stock companies as are



"organized under the laws of the United States or of any State," etc., which therefore means only those that have been legalized—*i. e.*, enfranchised—by public authority.

In *Liverpool Insurance Company v. Massachusetts*, 10 Wall., 566 (1870), this Court held that a British insurance company organized under acts of Parliament as a joint-stock company was a corporation and would be held so under the laws of most of the States although in that case the stockholders were individually liable for debts of the company. The Court held that its distinctive and artificial name by which it made its contracts, its power to sue and be sued in the name of one of its members, the power of members to transfer their interests at pleasure, the power of surviving beyond the lives of its members, etc., all having been legalized by acts of Parliament, assimilated the company to a corporation under our laws, and in the concluding paragraph of the opinion Mr. Justice MILLER said at page 576 :

" We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation \* \* \*."

In the case of *Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass., 524 (1877), it was held that under the Massachusetts statutes joint-stock companies were to be regarded as corporations organized under

general laws as distinguished from corporations formed under special charters.

In *People ex rel. Platt v. Wemple*, 117 N. Y., 136 (1889), the United States Express Company, one of the very few important joint-stock companies in America, was said to have "the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships" (p. 144). That case is especially interesting from the fact that it involves the interpretation of a tax statute of New York which was evidently taken in part as the form for the Corporation Tax Law of 1909. The New York statute provided that:

"Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State \* \* \* shall be subject to, and pay a tax, as a tax upon its corporate franchise or business." \* \* \* (p. 146).

The United States Express Company maintained that it was a mere partnership and not within the statute, but the Court, pointing out the articles of association and the peculiar rights which it purposed exercising and that statutes of the State of New York provided for just such an organization, concluded that it was not a partnership and was taxable. From the

opinion of the New York Court of Appeals we extract the following at page 146 :

" In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view, also, of the statutes which legalize its assumed capacities and make valid and effective its asserted right of succession, its distinctive name and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true those articles contain no reference to any statute of the State, as one under or by which the company was organized, yet, by the very constitution of the body itself and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880 (*supra*) as ' a corporation, joint-stock company or association.' The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body, and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law, which sanctions the union."

And on page 147 :

"In the case before us the agreement, which brought many persons into one artificial body, was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated, that is, formed or united under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association."

We think it therefore perfectly clear that the Corporation Tax Law in including joint-stock companies and associations "organized under the laws of the United States or of any State" meant to include only those companies which by virtue of such laws have powers, privileges or franchises similar to those of corporations. It follows from this that the joint-stock companies stand on the same basis as the corporations as far as the corporation tax is concerned.

We have, perhaps, extended this point more than was necessary because it seems to us that it is really immaterial how the Court views the joint-stock companies within the provisions of the act. If they are partnerships it must be admitted that they are peculiar, limited and few in number. If it be said that Congress has selected that peculiar form of business organization as one of the objects of taxation under the Corporation

Tax Law and if it be said that joint-stock companies have no corporate franchises or other franchises created by sovereignty, such propositions, even if they were sound, would not in the slightest degree sustain Congress in also selecting for taxation corporate capacity and thereby placing a tax on corporate franchises. In other words if Congress could put an excise tax on joint-stock companies because they are partnerships enjoying no franchises from state sovereignty it does not follow that Congress may place a similar tax on corporate franchises enjoyed by corporations.

#### **SIXTH POINT.**

**The brief of the Government does not meet our case.**

#### **A.**

With all the ingenuity of the learned late Solicitor-General in dissecting and analyzing the Corporation Tax Law for the sake of determining a proper description of the tax imposed, he did not get away from the ever present fact that the *existence of a corporate franchise is essential to the incidence of the tax*. It may be technically correct to describe the tax as a tax on business, a tax on occupations, an excise, an income tax, or some other variety of

tax or excise. It may be one or more of such impositions, but when all is said the fact still remains that in addition to the tax being one or more of such enumerated taxes it is also levied by reason of the existence or enjoyment of a corporate franchise, and is, therefore, also a franchise tax. The late Solicitor General did not advance his argument beyond this juncture.

A tax may have two characters at the same time. To illustrate: a State may lay an ordinary property tax. Included in property liable to assessment may be property which, while having been imported from abroad, has become intermingled with the general mass of property. That tax is valid. But if that property tax shall be so limited that it touches only the property which has been imported, the tax becomes, in addition to a property tax, an impost which is beyond the power of the State to levy.

Again, a State may tax, with other property, such property as is used in interstate commerce. That tax is valid. But if the State should so limit that tax that it fell only on property used in interstate commerce the tax would be construed as being a tax on interstate commerce in addition to being a property tax and it would be void.

A still further illustration: a State may lay a tax on occupations, including, say, manufacturing. Such a tax is valid. But suppose a State should limit its occupation tax to only those manufacturing concerns

which use things or processes protected by United States letters patent. Such an occupation tax would be also a patent tax and void.

So we say that the United States may tax a business or many businesses done by individuals, partnerships and corporations. Such a business tax is valid. But if the business tax is limited to only such business as is conducted through corporate form, the tax, in addition to being a business tax, becomes also a tax on corporate capacity. We say that such a tax, besides being a business tax, is a franchise tax, and that when the corporate capacity is the creation of a State, the tax includes something that is not a legitimate subject of Federal taxation, and that the tax is unconstitutional upon the authority of *California v. Central Pacific Railroad*, 127 U. S., 1. Define and refine the "Corporation Tax" as much as we please, the tax still remains, in its ultimate analysis, a franchise tax, whatever other qualities it may also possess.

#### B.

To say that this tax cannot be a franchise tax because franchises not used or not productive of income are not taxed is utterly fallacious. It was no answer to the income tax of 1894 to say that it was not a land tax because vast tracts of land yielded no income. The fact that some land yielded no income did not prevent the income tax being a land tax on such land as yielded income.

To say that the inclusion of joint-stock companies deprives the tax of its nature as a franchise tax is also fallacious. The case decided by the Court of Appeals of New York (*People ex rel. Platt v. Wemple*, 117 N. Y. 136), cited at length on pages 133 to 135 of this brief, and mentioned on the first oral argument by counsel for the Home Insurance Company, was apparently misunderstood by him. The New York Court of Appeals distinctly pointed out that the New York statute regarding joint-stock companies gave validity and vitality to the structure of the company then before the Court and endowed it with powers which placed it on a level with enfranchised corporations. We feel that counsel who, with others before this Court on the original argument on March 17, 1910, seemed to join forces with the Government in an effort to break down or becloud or slur over the vital point of the case at bar, rested their arguments rather on some of the minor details and on the superficialities of the law and have never gone to the heart of the situation.

We cannot believe that this Court will accept the new and astonishing theory advanced by the late Solicitor-General to the effect that a corporate franchise is not a creation of the State because applications for corporate franchises depend on the volition of individuals. Such a theory is contrary to all authorities in our jurisprudence. As reasonable would it be to say that a Federal patent is not the creation of the



United States because inventive genius and a willingness to apply for the patent must exist before the franchise of the patent is granted to the citizen. That such arguments must be resorted to by the law officers of the United States in order to defend this extraordinary law must certainly arouse suspicion that sounder arguments cannot be found.

C.

There is no authority cited in the brief of the late Solicitor-General which meets any of the points urged in our brief, and we submit that the Court cannot sustain this law upon the authority of any adjudicated case.

This law means nothing short of Federal visitation of State corporations and that means the destruction of State corporations which is the complete equivalent of the power to declare the forfeiture of corporate franchises.

Generally speaking, it is only comparatively small corporations that are chartered by the State of Vermont. From the granting of our charters and from the annual franchise taxes our State derives a considerable portion of its revenue. Our State needs this revenue and needs this source of revenue. We feel that under the enforcement of this Act of Congress our corporations will surrender their charters and that industry in corporate form, with all its advantages to public and private interests within our State, will seriously diminish.

To support this law will involve grave diminution of State sovereignty without actually increasing the tax resources of the General Government because already the defendant corporation and all corporations may be taxed by the United States on business through a general business tax which does not make the existence of a corporate franchise the test of liability. We cannot believe that this Court is willing to sustain this new and wholly unnecessary invasion of State sovereignty which was never understood or agreed to when Vermont was admitted to the Union and which was flatly prohibited by the Tenth Amendment to the Federal Constitution.

#### **SEVENTH POINT.**

**The judgment of the Court below should be reversed.**

MAXWELL EVARTS,

HENRY S. WARDNER,

Of Counsel for Appellant.

JOHN G. SARGENT,

Attorney General of Vermont,  
representing the State of Vermont,  
with Counsel for Appellant.

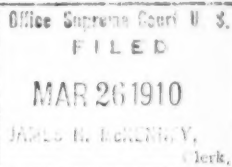


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# Supreme Court of the United States.

OCTOBER TERM, 1909.

No. [REDACTED] 407.



STELLA P. FLINT, as General Guardian of the  
Property of SAMUEL N. STONE, Junior, a Minor,

*Appellant,*

*vs.*

STONE TRACY COMPANY, FRANK B. TRACY,  
IDA S. TRACY and LEON B. HAYWARD,

*Appellees.*

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APPEAL FROM THE CIRCUIT COURT OF THE  
UNITED STATES FOR THE DISTRICT  
OF VERMONT.

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REPLY BRIEF FOR APPELLANT.

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MAXWELL EVARTS,  
HENRY S. WARDNER,

*of Counsel for Appellant.*

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# Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT, as General  
Guardian of the Property of  
Samuel N. Stone, Junior, a  
Minor,

Appellant,

vs.

STONE TRACY COMPANY, FRANK  
B. TRACY, IDA S. TRACY and  
LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF VERMONT.

## REPLY BRIEF OF APPELLANT.

### I.

With all the ingenuity of the learned Solicitor-General in dissecting and analyzing the corporation tax law for the sake of determining a proper description of the tax imposed, he did not get away from the ever present fact that the *existence of a corporate franchise is essential to the incidence of the tax*. It may be technically correct to describe the tax as a tax on business, a tax on occupations, an excise, an income tax, or some other variety of

tax or excise. It may be one or more of such impositions, but when all is said the fact still remains that in addition to the tax being one or more of such enumerated taxes it is also levied by reason of the existence or enjoyment of a corporate franchise, and is, therefore, also a franchise tax. The Solicitor-General has not advanced his argument beyond this juncture.

A tax may have two characters at the same time. To illustrate: A State may lay an ordinary property tax. Included in property liable to assessment may be property which, while having been imported from abroad, has become intermingled with the general mass of property. That tax is valid. But if that property tax shall be so limited that it touches only the property which has been imported, the tax becomes, in addition to a property tax, an impost which is beyond the power of the State to levy.

Again, a State may tax, with other property, such property as is used in interstate commerce. That tax is valid. But if the State should so limit that tax that it fell only on property used in interstate commerce the tax would be construed as being a tax on interstate commerce in addition to being a property tax and it would be void.

A still further illustration: a State may lay a tax on occupations, including, say, manufacturing. Such a tax is valid. But suppose a State should limit its occupation tax to only those manufacturing concerns which use things or processes protected by United States letters patent. Such an occupation tax would be also a patent tax and void.

So we say that the United States may tax a business or many businesses done by individuals, partnerships

and corporations. Such a business tax is valid. But if the business tax is limited to only such business as is conducted through corporate form, the tax, in addition to being a business tax, becomes also a tax on corporate capacity. We say that such a tax, besides being a business tax, is a franchise tax, and that when the corporate capacity is the creation of a State, the tax includes something that is not a legitimate subject of Federal taxation, and that the tax is unconstitutional upon the authority of *California v. Central Pacific Railroad*, 127 U. S. 1. Define and refine the "Corporation Tax" as much as we please, the tax still remains, in its ultimate analysis, a franchise tax whatever other qualities it may also possess. The foregoing remarks will fully illustrate, we think, the force of the question put by Mr. Justice White to Mr. Johnson.

## II.

To say that this tax cannot be a franchise tax because franchises not used or not productive of income are not taxed is utterly fallacious. It was no answer to the income tax of 1894 to say that it was not a land tax because vast tracts of land yielded no income. The fact that some land yielded no income did not prevent the income tax being a land tax on such land as yielded income.

To say that the inclusion of joint-stock companies deprives the tax of its nature as a franchise tax is also fallacious. The case decided by the Court of Appeals of New York (*People ex rel. Platt v. Wemple*, 117 N. Y.



136), cited at length on our main brief at page 102, and mentioned on the oral argument by counsel for the appellee in case No. 752, was apparently misunderstood by him. The New York Court of Appeals distinctly pointed out that the New York statute regarding joint-stock companies gave validity and vitality to the structure of the company then before the Court and endowed it with powers which placed it on a level with enfranchised corporations. We feel that counsel who, with others before this Court on March 17, have seemed to join forces with the Government in an effort to break down or becloud or slur over the vital point of the case at bar, have rested their arguments rather on some of the minor details and on the superficialities of the law and have never gone to the heart of the situation.

We cannot believe that this Court will accept the new and astonishing theory advanced by the Solicitor-General to the effect that a corporate franchise is not a creation of the State because applications for corporate franchises depend on the volition of individuals. Such a theory is contrary to all authorities in our jurisprudence. As reasonable would it be to say that a Federal patent is not the creation of the United States because inventive genius and a willingness to apply for the patent must exist before the franchise of the patent is granted to the citizen. That such arguments must be resorted to by the law officers of the United States in order to defend this extraordinary law must certainly arouse suspicion that sounder arguments cannot be found.

### III.

This point is not foreclosed by the case of *South Carolina v. The United States*, 199 U. S. 437, for that case is readily distinguishable on three separate grounds, stated at length in our main brief at pages 64 to 67, viz.: (1) on the ground that that tax was a general tax on a particular business which had always been taxed by the United States; (2) on the ground that that tax was laid because that particular business, to wit, liquor selling, was being transacted, and not because the State had granted any charter or authority to transact it; (3) on the ground that the dispensaries of South Carolina claimed that they were entitled to total exemption from an occupation tax, while no such claim is made in the case now at bar. In the case at bar the tax has no historic practice to support it. It is imposed, not on account of the nature of the business transacted, but merely because the persons transacting it are incorporated by the State of Vermont.

### IV.

There is no authority cited in the brief of the Solicitor-General which meets any of the points urged in our brief, and we submit that the Court cannot sustain this law upon the authority of any adjudicated case.

This law means nothing short of Federal visitation of State corporations and that means the destruction of State corporations which is the complete equivalent of the power to declare the forfeiture of corporate franchises.

Generally speaking, it is only comparatively small corporations that are chartered by the State of Vermont. From the granting of our charters and from the annual franchise taxes our State derives a considerable portion of its revenue. Our State needs this revenue and needs this source of revenue. We feel that under the enforcement of this Act of Congress our corporations will surrender their charters and that industry in corporate form, with all its advantages to public and private interests within our State, will seriously diminish.

To support this law will involve grave diminution of State sovereignty without actually increasing the tax resources of the General Government because already the defendant corporation and all corporations may be taxed by the United States on business through a general business tax which does not make the existence of a corporate franchise the test of liability. We cannot believe that this Court is willing to sustain this new and wholly unnecessary invasion of State sovereignty which was never understood or agreed to when Vermont was admitted to the Union and which was flatly prohibited by the Tenth Amendment to the Federal Constitution.

MAXWELL EVARTS,

HENRY S. WARDNER,

Of Counsel for Appellant.

# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

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STELLA P. FLINT, AS GENERAL GUARDIAN of the property of Samuel N. Stone, jr., a minor, appellant, v. STONE TRACY COMPANY ET AL.	}	No. 747.
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*APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF VERMONT.*

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Also fourteen other cases advanced for hearing with the  
preceding case, viz:

WYCKOFF VAN DERHOEF, APPELLANT, v. THE Coney Island and Brooklyn Railroad Company et al.;	}	No. 751.
FRANCIS L. HINE, APPELLANT, v. HOME LIFE IN- surance Company et al.;	}	No. 752.
FRED W. SMITH, APPELLANT, v. THE NORTHERN Trust Company, A. C. Bartlett, William A. Fuller, et al.;	}	No. 753.
WILLIAM H. MINER, APPELLANT, v. THE CORN Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, et al.;	}	No. 754.
CEDAR STREET COMPANY, APPELLANT, v. PARK Realty Company;	}	No. 757.
LEWIS W. JARED, APPELLANT, v. THE AMERICAN Multigraph Company et al.;	}	No. 767.
JOSEPH E. GAY, APPELLANT, v. THE BALTIC MIN- ing Company et al.;	}	No. 775.
PERCY H. BRUNDAGE, APPELLANT, v. BROADWAY Realty Company et al.;	}	No. 784.
PAUL LACROIX, APPELLANT, v. MOTOR TAXI- meter Cab Company et al.;	}	No. 785.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS Trustees under the last will and testament of George Baty Blake, deceased, appellants, v. Interborough Rapid Transit Company et al.;	}	No. 796
GEORGE WENDELL PHILLIPS, APPELLANT, v. FIFTY Associates et al.;		
OSCAR MITCHELL, APPELLANT, v. CLARK IRON Company;	}	No. 800
WILLIAM F. FLUHRER, ALBERT W. DURAND, AND Howard H. Williams, appellants, v. New York Life Insurance Company;		
KATHERINE CARY COOK, HARRIET HUNTINGTON Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, their guardian and next friend, appellants, v. Boston Wharf Company et al.	}	No. 819.

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## BRIEF FOR THE UNITED STATES.

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### STATEMENT.

This brief is filed by leave of court in all the fifteen above-named cases.

The general question presented in all the cases is the constitutionality of section 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" enactment. (Statutes of the United States passed at the first session of the Sixty-first Congress, 1909, pp. 11, 112-117.) The section is printed in full as an *Appendix* to this brief.

The cases may be divided into four groups:

(1) Those of miscellaneous companies, which present no exceptional problem under the statute; whereof the Stone Tracy Company (No. 747) is a general merchandizing corporation, The Northern Trust Company (No. 753) is a trust company of Illinois, The Corn Exchange National Bank (No. 754)

is a national bank, The American Multigraph Company (No. 767) is a manufacturing corporation, The Baltic Mining Company (No. 775) is a mining corporation, and the Motor Taximeter Cab Company (No. 785) owns and leases motor vehicles.

(2) Those of insurance companies, viz: The Home Life Insurance Company (No. 752) and the New York Life Insurance Company (No. 816).

(3) Those of so-called public service corporations, viz: The Coney Island and Brooklyn Railroad Company (No. 751) and the Interborough Rapid Transit Company (No. 796).

(4) Those of companies whose transactions relate chiefly, and in some cases solely, to real estate, viz: The Park Realty Company (No. 757), the Broadway Realty Company (No. 784), the Fifty Associates (No. 797), the Clark Iron Company (No. 800), and the Boston Wharf Company (No. 819).

All these companies are corporations "organized for profit;" and all of them, except the New York Life Insurance Company, have "a capital stock represented by shares." The New York Life Insurance Company is "without any capital stock;" but all the assets and income of that company "are acquired, invested, reserved, and held for the sole benefit and protection of the holders of policy and annuity contracts issued by defendant upon the conditions" prescribed in the insurance law of New York, "and such assets and income are paid and distributed to such holders, at the times, in the proportions, and by the methods, in such conditions

of said Insurance Law fixed and determined" (Rec., 1; No. 816). Its holders of policy and annuity contracts are therefore the shareholders of the New York Life Insurance Company. Indeed, the bill against that company expressly alleges that the payment of the tax will "decrease the amounts which the policy-holders are entitled to receive as dividends or in reduction of the premiums upon their policies" (Rec., 5; No. 816).

The operations of the several companies whose dealings relate mainly or solely to real estate vary in character, as do their charter powers; and such statement as is needed concerning the particular nature of the powers and transactions of those several companies will be made in the Third Point of this brief, which considers especially the tax upon those companies.

#### ARGUMENT.

All the questions involved in the various cases will be discussed under the following general propositions:

*First.* The tax is not a direct tax upon the property, real or personal, of the corporations, joint stock companies or associations, or insurance companies which are required to pay the tax. On the contrary, the tax is an excise, as the statute expressly declares, upon "the carrying on or doing business" by such companies; and it therefore needs no apportionment among the states according to population under section 2 of Article I or clause 4 of section 9 of Article I of the Constitution of the United States.

*Second.* The tax is not a direct tax upon shares of the stockholders in the companies to the business of which the tax attaches, or upon the income of such stockholders from their shares.

*Third.* The tax does not become direct in the special case of a company engaged mainly, or even solely, in the business of handling or dealing in real estate.

*Fourth.* The tax is not an infraction of the general power of the states to authorize the formation of corporations and joint stock companies.

*Fifth.* The business of public service companies, such as railroad, street railway, telephone, telegraph, light, water, heat, and power companies is not intrinsically an operation of the state which created the company; and in no case at bar is the state shown, through any peculiar relations established between itself and the public service company, to have made the business of the company its own. Further, the United States may tax even a business conducted for or by a state itself.

*Sixth.* The tax is not imposed upon state or municipal bonds, or upon the income of such bonds, forming part of the business assets of the company whose business is taxed; and the company's income from such bonds is to be included in the computation of its net income.

*Seventh.* As an excise, the tax is uniform under clause 1 of section 8 of Article I of the Constitution of the United States, though it is laid upon other



kinds of business than insurance only when the business is conducted by a corporation or joint stock company having shares of stock; and the imposition of the tax upon the business of such corporations and joint stock companies, while the kindred business of individuals and partnerships is not taxed, does not take property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and does not contravene any rule of equal legislation implied from the nature of the National Government.

*Eighth.* None of the special rules prescribed by the taxing statute concerning exemptions or concerning application or computation of the tax produces any lack of necessary uniformity.

*Ninth.* The company required to pay the tax is not subjected to any unreasonable search or seizure, or improperly required to incriminate itself, by any of the administrative provisions of the statute.

*Tenth.* The tax may properly be collected in 1910, though it is measured by the net income of the tax-paying company during the calendar year 1909, of which seven months had already passed when, on August 5, 1909, the taxing statute was enacted.

*Eleventh.* If in any part or application this taxing statute is unconstitutional, it should be sustained nevertheless in all its other parts and applications.

Concerning these several propositions:

## FIRST.

The tax is not a direct tax upon the property, real or personal, of the corporations, joint stock companies or associations, or insurance companies which are required to pay the tax. On the contrary, the tax is an excise, as the statute expressly declares, upon "the carrying on or doing business" by such companies; and it therefore needs no apportionment among the States according to population under section 2 of Article I or clause 4 of section 9 of Article I of the Constitution of the United States.

## I.

The negative proposition—that this tax is not direct—is true if the tax be either a duty, an impost, or an excise, within section 8 of Article I of the Constitution; because all those species of tax are, in the constitutional sense, indirect.

It will likewise be immaterial, when we come to the question of uniformity, whether the tax in hand is a duty, an impost, or an excise; because section 8 of Article I of the Constitution requires but one kind of uniformity in all those species of tax, and that is merely geographical uniformity.

*Knowlton v. Moore*, 178 U. S. 41.

However, the affirmative proposition—that this tax is an excise on business—should be treated first because, if the tax can be shown to be an excise, its indirect character is thereby immediately established.

That course will also have the advantage of at once disclosing the exact subject of the tax, viz:

(1) In the case of other than insurance companies, the actual conduct or transaction of business under the special conditions which surround and with the special advantages which attach to such business when done under the exceptional legal rules applying to corporations and joint-stock companies (quasi-corporations).

(2) In the case of insurance companies, the actual conduct or transaction of their business, whether or not done under the exceptional, legal rules applying to corporations or joint stock companies.

## II.

The considerations which prove the tax to be an excise on the actual conduct or transaction of business may be presented in four divisions:

1. The explicit declarations of the statute itself, and their controlling force.

2. The numerous decisions of this court reenforcing, instead of contradicting, the explicit declaration of Congress that the tax is an excise.

3. Explanation and distinction of certain decisions of this court which are claimed to prove the tax to be direct, and so not an excise.

4. Answers to special claims that particular features of the statute show the tax to be on property rather than on business.

Of these, successively—

1. The statute imposes the tax in language which leaves no doubt concerning either the subject or the

nature of the tax. It says "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually *a special excise tax with respect to the carrying on or doing business* by such corporation, joint stock company or association, or insurance company, *equivalent to one per centum upon the entire net income over and above \$5,000 received by it from all sources during such year,*" etc. The *subject* of the tax is thus expressly declared to be "the carrying on or doing business by" the companies taxed. The property of the company is not the subject of the tax; the franchises of the company are not the subject of the tax. So far as property or franchises are involved at all, it is only their *use in business*, among the necessary instruments of the business, that forms the subject of the tax. The *nature* of the tax is legislatively announced no less clearly than the subject of the tax. The statute says that it imposes "a special excise." While this legislative description of the tax can not prevail against the true character of the tax, as manifested by the subject of the tax, it will be found strictly accordant with the real nature of the tax when the decisions of this court are considered in the next division; and the point now important is that, even if the statutory language defining the subject of the tax could possibly be considered in any way ambiguous, with the result of leaving it uncertain whether property or franchises or the actual transaction of business is the

subject of the tax, still the legislative statement that the tax is intended by its makers to be an excise would suffice to resolve the ambiguity by compelling construction of the statute in a way to make the subject of the tax such as a true excise may be laid upon, viz, in this case the conduct or transaction of business, rather than such as is not the proper subject of an excise. If, then, the statute were less clear and emphatic than it is in showing the subject of the tax to be the actual conduct or transaction of business, the statutory statement that the tax is legislatively intended as an excise would remove any uncertainty.

Further, the statute does not say that the tax is imposed "*upon* the entire net income," though we shall see later that even such language could and should be held to impose an excise upon the business; but the statute again is explicit and careful, saying that the tax "with respect to the carrying on or doing business" shall be "*equivalent to one per centum upon the entire net income.*" This language is a specific legislative indication that even the net income of the business is not itself the subject of the tax. It shows, again, that the transaction of business is the subject of the tax, and that the income of the business is used merely as *a means of measuring* the amount of tax, which rests not upon that income but upon the occupation from which it is derived. This court has already had occasion to consider just such a tax as the present, imposed by like language (*Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397); but it may be said shortly, before coming to a

consideration of the decided cases, that measurement of a tax upon the transaction of business by some particular feature or result of the business not only is proper, but is necessary if the amount of tax on the business is to be determined in any more or less equitable way instead of being imposed arbitrarily. An excise on business of course can be fixed in its amount by the legislature itself, and so can even be made by the legislature the same for different kinds of business or for businesses of the same kind but different size; and unless some rule of measuring the tax by something else than the transaction of business, which is the subject of the tax, is prescribed by the legislature, the amount of tax must be directly and arbitrarily fixed by the legislature. That, however, is obviously unjust, unless the tax is to be of insignificant amount, because it takes no account of differences in volume or profitableness of business, and therefore wholly neglects the serviceableness of the taxed business to its proprietor and the ability of the taxpayer to meet the tax. If a rule of measuring the tax is to be adopted, then, what shall it be? It may be the number of men employed in the business, or the number of transactions had in the business, or the volume of things made or sold in the business, or the gross income of the business, or the net income of the business—any one of these or of a hundred more from which the legislative discretion may choose. The use of one measure is, as much as the use of any other, mere measurement; and the subject of the tax, when clearly indicated to be the conduct or

transaction of the business, is not altered by change of the measure of the tax. If this were otherwise, however, in case of the use of some measures, it would still be true that a tax laid in terms upon the conduct of business is not altered in its nature or subject because it is measured by the net income of the business. Such measure, far from being inappropriate to a business tax, is the most apt and just of all measures for such a tax. Net income from business has the business for its source; measures, not the mere size, but the profitableness of the business; measures therefore the utility to the taxpayer of that on which he is taxed, viz, the business; and accords, more often and more nearly than anything else can, with the ability of the proprietor of the business to pay the tax. Finally, it is worth noting that measurement of a tax on business by its net income, beside being entirely consonant with the subject of the tax, carries no fair or real suggestion of a design to tax property. Net income, and even gross income, from business has no usual relation to the amount of property employed in the business, whether different sorts of business or the same business at different times be considered. In one kind of business, *e. g.*, expressing or plumbing, little property and much labor are employed, and the revenue from the business will therefore be large in comparison with the property engaged in the business. In another kind of business, *e. g.*, buying and selling land or wholesale merchandising, much property and little labor are employed, and revenue will therefore bear a relatively

small relation to the property engaged in the business. In other kinds of business, having an intermediate character, property and labor may be employed in the business in amounts more nearly equal, *e. g.*, in railroading or hotel keeping, and the revenue from the business may be attributed to the use of property and of labor in portions approximating equality. If the same business be considered at different times, the relation of net income to property engaged in the business will vary very largely. In prosperous times, when the amount of business done with a given plant is large, net income from the business will be much higher than in dull times, though the size of the plant with which the business is done remains the same. How, then, can the general use of net income from business as the measure of the amount of tax on business of all different kinds show a legislative purpose to reach property?

The express terms of the Congressional enactment showing (1) that the tax is legislatively intended as an excise, and (2) that the exact subject of the tax is the conduct or transaction of business, and (3) that net income of the business is not the subject of the tax but affords merely a measure of its amount, compel the conclusion that the tax is not direct.

2. Numerous decisions of this court, however, foreclose debate. They may be put for convenience into five groups:

(1) A case identical with the present, holding that a tax declared in the statute to be laid on business in



an amount "equivalent to" a certain percentage of income is an excise on the transaction of the business.

*Spreckels Sugar Refining Co. v. McClain*,  
192 U. S. 397.

The tax there involved arose under the statute quoted and construed in the opinion of the court as follows:

Coming now to the merits of the case, we first notice the contention of the plaintiff that the twenty-seventh section of the act of 1898 imposes a direct tax in violation of the constitutional provision relating to the apportionment of taxes of that kind among the several States.

The above section of the act of 1898 is as follows:

"SEC. 27. That every person, firm, corporation, or company *carrying on or doing the business* of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually *a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts* of such persons, firms, corporations, and companies *in their respective business* in excess of said sum of two hundred and fifty thousand dollars.

"And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation, or company

may be located, or in which such person has his place of business. Such returns shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return."

The contention of the Government is that the tax is not a direct tax, but only an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. Art. I, section 8. Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It can not be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as "a special excise tax," and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises. \* \* \* In view of these and other decided cases, we can not hold that the tax imposed on the plaintiff expressly with reference to its "carrying on or doing the business of \* \* \* refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is

other than is described in the act of Congress, a special excise tax, and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or reexamined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers (pp. 410, 411, 412, 413).

We have italicized in the quotation of the statute the language showing the identity of that act with the act now under consideration, so far as relates to the subject and nature of the tax and to the measurement of its amount by a percentage of income. This *Spreckels* case really disposes of the present point.

(2) Cases even stronger than the *Spreckels* case, in that they hold that a tax laid in terms on the income of a business—instead of being laid in terms upon the business in an amount equal or equivalent to a percentage of the income—is still an excise upon the business.

*Pacific Insurance Co. v. Soule*, 7 Wall. 433.

*Railroad Co. v. Collector*, 100 U. S. 595.

*United States v. Erie Ry. Co.*, 106 U. S. 327.

*Springer v. United States*, 102 U. S. 586.

In *Pacific Insurance Co. v. Soule*, the tax which was held to be an excise on business was imposed by section 105 of the act of Congress approved June 30, 1864, 13 Stat. 276, and by section 120 of that act as amended by the act of July 13, 1866, 14 Stat. 138, upon the "gross receipts of premiums, or assessments for insurance" (sec. 105 of the act of 1864), and "on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including nonresidents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds" (14 Stat. 138). This tax therefore was in terms put upon the income of business, whether undistributed or distributed in dividends.

In *Railroad Co. v. Collector*, *supra*, and *United States v. Erie Railway Co.*, *supra*, the act of Congress imposing the excise (quoted in 100 U. S. 596) laid the tax in terms upon the amounts paid by certain public service companies as interest on their funded debt or as dividends to their stockholders, and also on "all profits of such company carried to the account of any fund or used

for construction." The exact question before the court was whether the tax was laid on the bondholder who received the interest or dividend, or upon the company's earnings; and the latter view was held correct. Interest, dividends, construction expenditures, and money "carried to the account of any fund" were held to comprise the net earnings of the company; and the matter was summed up in these words:

It results from this course of observation that the tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest. (100 U. S. p. 598.)

And, as respects the nature of the tax, the court said:

The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute (Ib.)

In *Springer v. United States*, *supra*, the tax was laid by section 116 of the act of Congress approved June 30, 1864, 13 Stat. 281, as amended by the act of March 3, 1865, 13 Stat. 479, "upon the annual gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever;" and this tax was held not direct.

In *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, the court did not overrule the *Springer* case, but explained it as applicable only to income from the business which Springer conducted as an attorney at law, saying of the *Springer* case:

That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the Constitution. Unless the tax were wholly invalid, the defense failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.

The original record discloses that the income was not derived in any degree from real estate but was in part professional as attorney at law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct (pp. 578-579).

The *Springer* case, therefore, was treated in the *Pollock* case as supporting a tax laid in terms upon the income of business as an excise on that business; though further pertinence on the question of direct taxation was denied to the case.

At least four flat decisions of this court therefore hold a tax put directly upon the income of business to be an excise on the business. These cases, as already said, are even stronger than the *Spreckels* case.

(3) Cases holding various taxes to be excises on business, though they are laid in terms upon property engaged in the business.

*Provident Institution v. Massachusetts*, 6 Wall. 611.

*Hamilton Co. v. Massachusetts*, 6 Wall. 632.

*Veazie Bank v. Fenno*, 8 Wall. 533.

*United States v. Singer*, 15 Wall. 111.

*National Bank v. United States*, 101 U. S. 1.

In *Provident Institution v. Massachusetts*, *supra*, a tax required of a savings bank "on the amount of its deposits" was held to be an excise on the busi-

ness. In *Hamilton Company v. Massachusetts*, *supra*, the excise was a tax upon "the excess of the market value of all the capital stock of each corporation over the value of its real estate and machinery." Here, in other words, a tax in terms upon all corporate property, except real estate and machinery (doubtless otherwise taxed), was pronounced an excise. In *Veazie Bank v. Fenno*, *supra*, the tax was laid "on the amount of notes of any person, state bank, or state banking association used for circulation and paid out by" a national or state bank; and it was held an excise on the business. In *United States v. Singer*, *supra*, the excise wore the form of a tax in a stated amount upon spirits distilled in the business. In *National Bank v. United States*, *supra*, the excise was like that in *Veazie Bank v. Fenno*.

As a result, therefore, of this group of cases, we see that even formal imposition of the tax on property engaged in business does not negative its being an excise on the business.

(4) A case exhibiting an excise on business under a statute which, instead of laying the tax in terms on property engaged in the business, required the tax to be equal to a certain percentage of property so engaged.

*Society for Savings v. Coite*, 6 Wall. 594.

Here the tax was upon savings banks in a "sum equal to three-fourths of one per cent on the total amount of deposits."

(5) Cases which, while not relating to business, classify as excises various taxes imposed by Congress



upon special transactions concerning property or upon the enjoyment or exercise of particular privileges or advantages connected with property.

Here we have first the great group of inheritance tax cases.

*Scholey v. Rew*, 23 Wall. 331.

*Knowlton v. Moore*, 178 U. S. 41.

*Plummer v. Coler*, 178 U. S. 115.

*Murdock v. Ward*, 178 U. S. 139.

*United States v. Perkins*, 163 U. S. 625.

*Snyder v. Bettman*, 190 U. S. 249.

Of these cases, the first four decide the immediate point that an inheritance tax is not direct upon the inherited property, but is rather a tax upon the transmission and receipt of the property. In *Knowlton v. Moore* it was said:

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for

if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. \* \* \* The question which was thus reserved in *Scholey v. Rew*, and which was presented for decision in the Pollock case, was decided in the latter case, the court holding that taxes on the income of real and personal property were the legal equivalent of a direct levy on the property from which the income was derived, and therefore required apportionment. But there was no intimation in the Pollock case that inheritance taxes—which had been held in *Scholey v. Rew* not to be direct, which had from all time been considered as being *imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property* occasioned by death, and which had from the foundation of the Government been treated as a duty or excise—were direct taxes within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the Pollock case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because *imposed upon property solely by reason of its*

*ownership*, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy (pp. 78, 81).

In *Scholey v. Rew*, too, the inheritance was real property.

If a tax upon the exercise of the right to receive property, personal or real, by inheritance is not a direct tax on the property, though (as was true of all the Federal inheritance tax laws) the inheritance tax is measured by the value of the inherited property, it must be equally true that a tax upon the exercise of the right to use property in one or another kind of business—especially under the peculiar conditions and advantages of corporate business—is not a direct tax.

In *United States v. Perkins* and *Snyder v. Bettman*, *supra*, the immediate point of decision was that an inheritance tax imposed by a state on succession to a legacy by the United States, or an inheritance tax imposed by the United States on succession by a municipality of a state to a legacy, is not a tax upon the legacy itself. The distinction is again enforced between taxation upon the receipt of property and taxation upon the property itself. Such distinction is certainly no more plain or real than that between taxation of a business in which property is used and taxation of the property itself.

Another kind of excise is found in taxation of sales of corporate shares.

*Thomas v. United States*, 192 U. S. 363.

*Hatch v. Reardon*, 204 U. S. 152.

In sustaining such an excise, this court said:

The sale of stocks is a particular *business transaction* in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation. (192 U. S. p. 371.)

That is, such a tax falls within the indirect class.

Taxation upon the transaction of selling property is therefore different from taxation upon the property itself, at least when the sale is in a special manner and under the special legal rules pertaining to corporations. Even in its more limited interpretation, as applying only to a sale of corporate property under special rules, *Thomas v. United States* would be sufficient to show at any rate that the use of property in corporate business, under the special rules of law pertaining to such business, is a different subject of tax from property itself. Such limited interpretation of the doctrine, however, can not be accepted, in view of the stamp taxes put by Congress upon deeds and leases of real estate, and upon other forms of conveyance of both personal and real

property, at many different times and to a wide extent. Such stamp taxes are obviously imposed upon the transaction of conveyance of property, and they have never been considered direct taxes upon the conveyed property, requiring apportionment under the Constitution.

Finally, we have *Nicol v. Ames*, 173 U. S. 509.

This case sustained as an excise the tax put by Congress in 1898 upon sales of merchandise "at any exchange or board of trade, or other similar place," the tax being measured by the value of the article sold. The tax was held to be laid upon the enjoyment or utilization in the sale of the peculiar advantages afforded at an established place of general exchange. So, in the present case a tax upon business transacted by corporations may be said to be a tax upon the enjoyment or utilization in the business of the peculiar advantages accorded by the law to corporate business.

As a result of the varied and cumulative cases in the foregoing five groups, it is difficult to understand how the indirect character of the tax under consideration can be seriously questioned. No question could be more satisfactorily answered by existing authority.

3. Certain cases, however, are urged as undoing the long line of decisions showing excises, to which reference has just been made. It would be profitless to take up each case for which some such effect is claimed. Enough will be done if a word is given to the Income Tax Cases themselves, because of their

dealing immediately with the question of direct taxation, and to a very few leading cases (not dealing with the question of direct or indirect taxation) which are distinguishable for reasons frequently applicable to appellants' citations.

(1) As to the Income Tax Cases—

*Pollock v. Farmers' Loan & Trust Company*,  
157 U. S. 429; S. C. 158 U. S. 601.

These cases were carefully separated by the court from those of business excises. Mr. Chief Justice Fuller said, in the opinion after reargument:

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such. (158 U. S. 635.)

Again, in treating the separableness of the unconstitutional from the constitutional parts of the Income Tax Act of 1894, the Chief Justice said:

We do not mean to say that an act laying by apportionment a direct tax on all real estate or personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations (p. 637).

These statements were made with unmistakable reference to the provisions contained in section 27 of the act of 1894 concerning income "from any profession, trade, employment, or vocation carried on

in the United States or elsewhere," and to those provisions contained in section 32 of the act concerning taxation of "the net profits or income above the actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships." These provisions are quoted on pages 435-438 in 157 U. S.

It appears, therefore, that the court in the *Pollock* case expressly differentiated a general income tax from a tax on business income. *A fortiori*, an ordinary, general income tax is different from a tax on the transaction of business, which is merely measured by business income.

Turning to the exact holding of the *Pollock* case, we shall find the distinction to have been that a tax on income is a direct tax on the property, personal or real, which supplies the income, if the income proceeds from the mere ordinary or purely proprietary enjoyment of the property. The distinction does not reach to the case of taxation of income gained through the use of property, in conjunction with labor and usually also with other property, in business of one

or another kind. The quotation already made from *Knowlton v. Moore*, 178 U. S. 81, interprets the *Pollock* case—undoubtedly with the concurrence of the entire court—as referring to a tax “*imposed upon property solely by reason of its ownership.*” That must mean a tax upon property by reason of its mere existence or ordinary enjoyment, though the property is not put to some special use. A tax upon business is not a tax imposed upon property “solely by reason of its ownership;” for, if the property is not put into business use, no tax falls upon it or its income.

The distinction was put in still another way by the Chief Justice in the quotation above made from *Thomas v. United States*, 192 U. S. 371. He said:

The stamp duty is contingent on the happening of the event of sale, and *the element of absolute and unavoidable demand is lacking.*

That element must be present before there is direct taxation of property. No tax is direct unless it falls upon property or its income independently of the property's employment in a particular way.

Finally, in the *Spreckels* case, 192 U. S. 397, this court without dissent declared the irrelevancy of the *Income Tax Cases* to a statute putting a tax upon business, in these words:

It is said that if regard be had to the decision in the *Income Tax Cases*, a different conclusion from that just stated must be reached. *On the contrary, the precise question here was not intended to be decided in those cases.* For, in



the opinion on the rehearing of the *Income Tax Cases* the Chief Justice said: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such" (p. 413).

(2) As to certain typical citations made by appellants in support of their contention that the tax is direct on property—

It is said that a state tax upon the occupation of an importer is a tax on the import (*Brown v. Maryland*, 12 Wheat. 419); that a state tax upon income from an official position is a tax upon the office (*Dobbins v. Erie County Commissioners*, 16 Pet. 435); that a state tax upon a bill of lading for exported gold is a tax on the export (*Almy v. California*, 24 How. 169); and that a state tax on an auctioneer's sales of imported goods in the original packages is a tax upon the imports (*Cook v. Pennsylvania*, 97 U. S. 566). These cases, however, are entirely irrelevant to the question whether a Federal tax on the conduct of business is a *direct* tax on property used in the business. They are distinguishable in two ways:

(a) The taxes in the cited cases were all state taxes, and a state can not lay a tax upon an import or upon an office of the United States or upon an

export, *either directly or indirectly*. The taxes involved in the cited cases were, therefore, invalid, whether direct or indirect.

(b) Even if a state tax upon the occupation of an importer or upon an auctioneer's sale of imported goods in original packages were not considered a tax upon the import itself, and if a tax upon a bill of lading for transportation of property were not considered a tax upon the transportation itself, and if a tax upon official income were not considered a tax upon the office itself, still all the above state taxes would be invalid because they inevitably and materially hampered and interfered with importation and interstate or export transportation and the governmental operations of the United States; and a State can not interfere at all, *by tax or otherwise*, with free importation, free interstate commerce, free exportation, or free performance of the governmental work of the United States. This results from express clauses of the Federal Constitution and from the supremacy of the United States Government in its own field. We shall see, when treating points Fourth and Fifth in this brief, that the converse proposition—that the United States can not at all hamper or interfere with anything upon which the states have the reserved power to act, such as domestic commerce—is not true. The difference results from the fact that each power granted to the United States by the Constitution is superior to, and may override, many powers of a state. The Federal power is

supreme, and the state power is subordinate when the two meet.

Questions that look alike are often altogether different and must have different answers, because they arise under different provisions of the Constitution. This court has so said in the following language from *Hatch v. Reardon*, 204 U. S. 152:

It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by nonresidents, is a taking of property without due process of law, (*Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194.) This argument presses the expressions in *Brown v. Maryland* (12 Wheat., 419, 444); *Fairbanks v. United States* (181 U. S., 283), and intervening cases, to new applications, and farther than they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned. Compare *Foppiano v. Speed* (199 U. S., 501, 520). A tax on foreign bills of lading may be held equivalent to a tax on exports as against Article I, section 9; a license tax on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the State as against the Fourteenth Amendment so far as that alone is concerned (pp. 158, 159).

(3) As to *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217—

Nothing in that case is pertinent to the present case. Its decision was merely that “a tax upon railroad corporations \* \* \* equal to one per cent of their gross receipts,” (p. 224) from whatever source, is a tax on interstate commerce. Such decision did not depend at all upon the question whether the tax was on the business of the company in an amount equal to one per cent of its receipts or was directly upon the receipts. In either case the tax was on interstate commerce. Nor did it make any difference whether the interstate commerce was taxed directly or indirectly; for a state can not tax that commerce in any way.

4. The claim is made by appellants that the conduct or transaction of business can not be deemed the subject of the tax, unless in the case of insurance companies, because the same kind of business is not taxed when individuals or partnerships conduct it. This is asserted to show that the tax is on what corporations possess and individuals or partnerships in the same business do not possess, viz, franchises. The answers are obvious:

(a) Business done by a corporation or joint stock company, under the exceptional and advantageous rules of law applicable to them, is not the same, in either a legal or a practical view, with kindred business done by individuals or partnerships. The two *businesses* are importantly different; and *the impor-*

*tance of the difference proceeds, not from the presence or absence of franchises, but from the wide and important diversity of legal rules affecting the two kinds of business.*

(b) Even if possession or lack of franchises were the only difference between the business of a corporation and the business of an individual or partnership, it would not follow that the franchises are the subject of the tax. They might, and doubtless would be, on that supposition, the *reason* why the legislature puts a tax upon the business in which franchises are used and does not put it upon the business in which they are not used; but that which induces taxation need not be the thing taxed. The universal taxation of land is doubtless induced by the fact that it is immovable and visible, and so can not escape taxation; but the land, and not certain special qualities of it, is the subject of the tax.

(c) Further, it is not true that the diversity of general legal rules applying to corporate and unincorporated business and the possession or absence of franchises are the only differences between corporate and unincorporated business. On the contrary, *another difference (and, in reference to franchises, the practical and real difference) is in the exercise or use of the franchises in the corporate business, whereas they are not used in the unincorporated business.* Even if this tax were regarded merely as a tax upon the exercise or use of franchises, instead of being a tax on the entire conduct or transaction of business under many special conditions, it would be altogether different from a

*direct tax* on the franchises themselves. A tax upon the use of franchises in business is no more a direct tax upon the franchises than a tax upon the use of property in business is a direct tax upon the property so used. The numerous and decisive authorities already given settle that proposition, and particularly here.

*Veazie Bank v. Fenno*, 8 Wall. 533, 547.

(d) Still further, do all the varieties of joint stock company possess franchises? Their business is done under conditions and with incidents not attaching to any similar business done by individuals and partnerships; but many joint stock companies have no true franchises. A law, therefore, which taxes a business when done by a joint stock company of any kind, as well as when done by a corporation, can not be said to make franchises the subject of the tax, though the joint stock company has none.

(e) The tax is indisputably laid on the business of insurance companies, whether or not they are corporations or joint stock companies, and therefore whether or not they have any franchise or anything like a franchise. It is not reasonable to suppose that, when in the case of an insurance company its business is the subject of the tax, anything else than the conduct or transaction of business is the subject of the tax in the case of a corporation or joint stock company. Consider, for example, whether the tax is laid upon the franchises or the business of an insurance company which is a corporation. Is it possible to say that the franchises are the subject of the tax, though

in the case of an unincorporated insurance company its conduct or transaction of business is the subject of the tax?

(f) Finally and conclusively, *franchises can not be the specific subject of the tax. No tax is imposed in any way or on anything unless business is actually done.* The statute lays the tax in terms "with respect to the carrying on or doing business," whether by a corporation or joint stock company or insurance partnership. If no business is actually done, there is therefore no tax, notwithstanding the fact that the corporate franchises all the while exist and may have very large value. If franchises were the subject of the tax, they would of course fall under the tax independently of the actual transaction of any business in the exercise of the franchises and independently of there being any income from business. This ought to set the matter at rest.

Nor could it be admitted by any means that, if franchises were the subject of the tax, there would necessarily result a direct tax on franchises as property. On the contrary, even then the tax would have to be considered an excise on the franchises viewed and treated by the law as special privileges. Several things show this:

(a) In 1 Cooley on Taxation (3d ed.) the possibility of and the distinction between taxes on franchises as privileges and taxes on franchises as property are well set forth. Judge Cooley said:

An *excise* tax on the franchise of a corporation is sometimes imposed. Where a tax is plainly imposed on the corporate privilege, it must be sustained, even though in effect it duplicates the burden on the corporate body. But such taxes are often measured by a standard which suggests the question whether in fact they are not taxes on property, in which case they might not perhaps be admissible. A case in illustration is that of a percentage on the capital stock paid in; which in Massachusetts has been held to be not a property tax, but a tax on the franchise. (*Portland Bank v. Apthorp*, 12 Mass., 252.) *Such a tax may obviously be either the one thing or the other, and the phraseology of the statute under which it is laid may determine which it is in the particular case* (pp. 676, 677).

The reverse possibility of a tax on franchises as property is stated by Judge Cooley thus:

In some States all taxation as far as possible is brought to an *ad valorem* standard. Franchises are property, and in such States may be taxed by a valuation, being estimated for the purpose either separately or as a part of the aggregate corporate property (p. 686).

The Massachusetts cases thoroughly show that a tax on franchises may be an excise instead of a property tax. Indeed, various forms of tax in Massachusetts have been upheld as excises on corporate franchises, though under the constitution of that state they would not have been valid as taxes upon the



franchises treated as property. Besides *Portland Bank v. Apthorp*, 12 Mass. 252, we cite the following:

*Connecticut Mutual Life Insurance Co. v. Commonwealth*, 133 Mass. 161, 162, 163.

*Commonwealth v. Hamilton Manufacturing Co.*, 12 Allen, 298, 300-306.

*Commonwealth v. People's Savings Bank*, 5 Allen, 428.

The taxes on franchises were held to be excises in these cases, though in *Commonwealth v. Hamilton Manufacturing Company* the amount of the tax depended upon the excess value of the corporate shares above the value of the company's real estate and machinery, and though in *Commonwealth v. People's Savings Bank* the amount of the tax depended on the amount of deposits in the bank.

Like taxes have been recognized in many instances by this court as privilege taxes:

*Society for Savings v. Coite*, 6 Wall. 594.

*Provident Institution v. Massachusetts*, 6 Wall. 611.

*Hamilton Co. v. Massachusetts*, 6 Wall. 632.

*Maine v. Grand Trunk Railway Co.*, 142 U. S. 217.

*Home Insurance Co. v. New York*, 134 U. S. 594.

*Horn Silver Mining Co. v. New York*, 143 U. S. 305, 313.

(b) Which, then, is the tax under discussion—even if for the sake of argument it be admitted to rest directly on the franchises—a privilege tax or a property tax? At least three things show it to be a privilege tax and

not a property tax. In the *first* place, the tax is not exacted at all, in any way or on anything, unless the franchises are actually used in the transaction of business and a business income above \$5,000 results from such use. The franchises themselves, however, exist, though they are not used, and their value may be, and often is, great before use or in an interval of disuse. If the franchises were taxed as property, they would be taxed without reference to actual use; because they exist as property without reference to actual use. In the *second* place, the tax is not made to depend upon the value of the franchises, either alone or in connection with ordinary property. If it were, assessment of such value would be necessary and would be provided in the statute. It can not be said that the income which measures this tax measures likewise the value of the franchises, for that income does not proceed from the franchises alone, or even partly from the franchises, except as they are used. The income which measures this tax is that which results from "carrying on or doing business;" and that income results from the intermixed and cooperative employment of skill, labor, ordinary personal and real property of unnumbered kinds, and franchises (if the business is done by a corporation). Franchises alone can not be regarded as the source of the income any more than skill and labor alone or other kinds of property alone can be so regarded. Therefore, the point returns that this tax is not measured by the value of corporate franchises any more than it is measured by the value of any property

whatsoever. It is measured by income resulting from the transaction of business, and it is impossible to say that the tax is put upon franchises as property. In the *third* place, there is certainly room to treat this tax—if, for the sake of argument, it be conceded to rest upon corporate franchises—as a privilege rather than a property tax. Opportunity to so consider it is of itself enough to sustain the tax, for any ambiguity must be resolved in favor of the statute's constitutionality.

It is also claimed by appellants that this tax is not imposed on business, but on property directly, because it is measured by a company's net income "received by it from all sources" during the year. This proposition likewise has several answers:

(a) Obviously, the words "all sources" in the act mean, so far as they relate to property rather than activities of the business, such property as is engaged in or connected with the business. In other words, they relate only to what may be described generally as "business assets." Such is the natural and perhaps unavoidable result of the statement of the statute that the tax is laid "with respect to the carrying on or doing business" by the corporation, joint stock company, or insurance company. It would be unnatural, even though permissible, to measure a tax "with respect to the carrying on or doing business" by consideration of income from other than business assets, even in case of a business done by an individual or a partnership; and a corporation or joint stock company, as will soon be

argued, has no property which is not legally and practically an asset of the business. Beyond this, if the constitutionality of the statute be dependent in any way upon exclusion of income from other than business assets in the computation of the net income which measures the tax on business, that necessity is in itself a sufficient and controlling reason for interpreting the language of the statute, viz, these words "all sources," in a way that will make the statute constitutional rather than unconstitutional. No citation of authorities is necessary on that point. Such authorities abound and are but particular illustrations of the unquestioned maxim—*Benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*.

(b) All the property of a corporation is both *legally and practically* devoted to and used in the corporate business. This is true whether such property constitutes part of the regular capital of the corporation or is surplus derived from profitable operations of the corporation. As to capital: This consists of property contributed expressly for the purposes of the business or restoring the original contribution if for a time it has been diminished. The business adventurers deliberately embark such property in the enterprise. It constitutes a special fund, which can not be diverted from the business without proper consent of the proprietors. Even creditors also have distinct and important rights against its diversion to purposes foreign to the business. It is sometimes called by law "a trust fund;" and, whether that description be in all

respects accurate or not, a real analogy exists in the rules of law concerning corporate capital and trusts generally. Such rules, indeed, are the necessary converse of the immunity of corporate stockholders from personal liability for the business debts. *Practically also* capital is used in the business, even if not all of it is directly active at a given time. The more capital a company has the greater is the public confidence in it; with the results that it can borrow money at a lower rate of interest, it can obtain lower prices on its materials because of its greater credit or because of the more reliable permanence of its patronage of those who sell to it, and it will even do more business in selling its own service or product because of the greater general confidence in its reliability and stability. As to surplus: This, like regular capital, is devoted by the business adventurers to the uses of the business no less because the adventurers might take it out of the business if they saw fit. It can not be diverted from the business any more than capital without the proper consent of the proprietors. Practically, of course, surplus operates to the advantage of the business as much as an equal amount of capital and procures for the business an enlargement of transactions and a greater economy of operations in the same way as capital. Additionally, surplus has the business as its source and can go out of the business in no way but to meet business obligations or in distribution of business profits.

Indeed, as to both capital and surplus, a corporation (formed, for profit, and therefore for the conduct

of a business described in its charter) *has no right to hold any property except for the purposes of the business*, and therefore as business assets. It can not legally be a mere proprietor of property unconnected with the business. An attempt by the corporation to hold extrinsic property would be an abuse of its charter, and expose it to forfeiture of that charter. No corporation can claim that it holds property in any other way than as business assets when it has no right so to hold property. It is legally estopped from questioning the business character of its assets.

(c) What has been said concerning the capital and surplus of a corporation will apply likewise to the capital and surplus of a joint stock company having shares. All the property of that company is represented by the shares, and the shareholders devote it to the purposes of the business. There is both a legal and a practical tie between the company's property and its enterprise. What property the shareholders have individually is not represented by the shares, and so is out of the business. Their property represented by the shares is in the business. The line of demarcation between the property in the business and the individual property of the several persons concerned in the business is the same as in the case of a corporation. And practically, of course, the property belonging to the joint stock company brings to the business the same opportunity of enlarged transactions and increased profit as the

same property would bring to the same business conducted by a corporation.

And an excise on business may be measured even by the *capacity* of the business plant, though its actual operations are less than its capacity. (*United States v. Singer*, 15 Wall. 111, 120, 121.)

(d) There is nothing to the contrary of all this in the *Spreckels* case, 192 U. S. 397. It was there held that the statute imposing an excise upon all persons and companies "carrying on or doing the business of refining petroleum or refining sugar" in an amount "equivalent to" a percentage "of all receipts of such persons, firms, and corporations and companies in their respective business" (p. 410) referred only to "receipts in the business of refining sugar, not receipts from independent sources" (p. 417). The court went on:

But, clearly, neither interest paid to the plaintiff on its deposits in bank nor dividends received by it from investments in the stocks of other companies were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the

receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of *refining sugar*, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with *that* business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. *In the absence of any showing to the contrary*, it must be assumed that the declaration or the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged (p. 417).

It was, perhaps, to meet just this ruling that the Corporation Tax enactment requires income from "all sources" to be computed; meaning thereby the income from all assets of the business as a general whole. As a matter of construction, the statute now under consideration cannot be given the restricted meaning put upon the statute in the *Spreckels* case, unless indeed the constitutionality of the new statute so demands. The statute involved in the *Spreckels* case defined the particular business, or division of the company's general business, on which the tax was to be computed. It specified "refining sugar." Here the statute does not define the business, or limit the computation of the amount of tax by income from any single part of the company's entire business; and, on the contrary, it explicitly requires all income that can be considered business income of any kind



to be taken into the computation. Nor does the *Spreckels* case hold inclusion of all the corporate income to be unconstitutional. That case merely interpreted the statute in a particular, restricted way, without even suggesting that such interpretation was required by any constitutional reason. Nothing whatever was said, or involved, concerning the constitutionality of such a statute as now is before the court. The constitutional right of the legislature to measure a tax upon the business of a corporation or joint stock company by a percentage of the income of that corporation or joint stock company from all its assets follows from the necessary character of all the corporate or joint stock company's property as business assets; which has already been shown.

Some appellants assert that the tax is shown to be on income or property rather than on the actual transaction of business because the statute allows dividends received by the taxed company on stocks owned by it in other companies, which are themselves subject to the tax, to be excluded from the computation of net income. This claim, however, can have no weight. Congress was evidently influenced to the exclusion of such dividends by an equitable purpose of not requiring the tax to be increased in amount because of income which had already been affected and reduced by the tax. Such equitable rule has equal propriety whether the tax is on business or on property; and is equally consistent with either view. A similar contention was

made in *Commonwealth v. Hamilton Manufacturing Company*, 12 Allen, 298, as a support for the general claim that the tax was on property, but that contention was rejected in these words:

It was suggested that the deduction of the value of the real estate and machinery from the aggregate market value of the stock allowed by the statute was an indication that the tax was in fact a tax on property and not an excise on the franchise. But we do not think that much weight can be given to this consideration. The reason for the deduction is obvious. The real estate and machinery of corporations, under the general tax act, are subject to local taxation in the towns where they are situated. Inasmuch as all taxes on corporate property operate to take away a portion of that which would otherwise belong to shareholders, it would tend to inequality and to double taxation, if, in assessing the excise on the franchise, no deduction were made for what was taxed in a different manner elsewhere. It was this consideration, doubtless, which led to the allowance of the deduction, as a similar one was permitted in St. 1862, c. 224, imposing the amount of tax on savings banks. (See *Commonwealth v. People's Five Cents Savings Bank*, *ubi supra*.) But we do not see that this provision has any bearing on the nature of the tax imposed by the statute in question (pp. 305, 306).

## III.

The established rule that the states may tax property used in interstate commerce, though they may not tax the business of interstate commerce or income from that business, shows that a tax upon the business is different from a tax upon the property employed in that business, and so is not direct.

The difference of rule is settled. Neither interstate business nor the income from interstate business may be taxed by a state.

*Philadelphia & Southern Mail S. S. Co. v. Pennsylvania* 122 U. S. 326.

*Galveston, Harrisburg, etc., Ry. Co. v. Texas* 210 U. S. 217.

On the other hand, the property used in interstate business may be taxed by a state.

*Pullman Palace Car Co. v. Pennsylvania* 141 U. S. 18.

*Adams Express Co. v. Ohio State Auditor* 166 U. S. 185.

*Fargo v. Hart* 193 U. S. 490.

It follows inevitably that a tax on property, without reference to its use, is legally different from a tax on business, though it includes the use of property in that business. The proposition that a tax on property is not the same as a tax on the business in which that property is used is in fact the mere converse of the proposition that a tax on business is not a tax on the property used in that business.

## SECOND.

The tax is not a direct tax upon shares of the stockholders in the companies to the business of which the tax attaches, or upon the income of such stockholders from their shares.

Three lines of reasoning lead to this result:

## I.

The outcome of the First Point, that this tax is not direct on property, but is an excise on the conduct or transaction of business, really includes our Second Point. If the tax is not direct on the property of the corporation or joint stock company itself, *a fortiori* it is not direct on the rights of the several shareholders to receive proportionate parts of that property in the event of a distribution; and, if the tax is an excise on the business of the corporation or joint stock company, *a fortiori* it is no more than an excise on the individual stockholder's participation in the business.

If this tax could be deemed to fall on the property or income of the shareholders, it would still be only a tax on the use of that property in, or income of that property from, "business"—not on the mere ordinary proprietary enjoyment of the shareholders' property.

## II.

But in truth a tax on the business of the company is not, in legal view, a tax on the shares of the company's stock or on the income from those shares at all.

*Logan County v. United States*, 169 U. S. 255, is here conclusive.

Logan County held stock in a railroad company. The United States had collected an excise tax on the railroad company's "profits carried to the account of any fund or used for construction." A stock dividend was thereafter made by the railroad company. Logan County claimed that its portion of this stock dividend was less because the surplus funds of the railroad company had been reduced by the Federal tax upon it; that the tax on the railroad company's business was therefore really a tax on Logan County's dividend; that the property and revenues of a municipal corporation are not taxable by the United States (*United States v. Railroad Co.*, 17 Wall. 322); and that, as a final result, Logan County was entitled to recover from the United States the amount by which its stock dividend had been reduced in consequence of the tax, in an action which Congress had expressly allowed to be brought against the United States as a test of the matter. It was held that the tax, being imposed upon the business of the railroad company, was not a tax upon Logan County's share of the railroad company's surplus funds or upon Logan County's stock dividend based on those funds. The court said:

Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the Government from the company itself, and not one penny could

properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus (p. 259).

It was of course unimportant whether the tax upon the railroad company's business was a direct or indirect tax upon Logan County's property. If it was a tax on that property at all it was invalid.

The same result follows from the Inheritance Tax Cases.

*Knowlton v. Moore*, 178 U. S. 41.

*Plummer v. Coler*, 178 U. S. 115.

*Murdock v. Ward*, 178 U. S. 139.

*United States v. Perkins*, 163 U. S. 625.

*Snyder v. Bettman*, 190 U. S. 249.

As already stated, these cases held that the tax was on the transmission and receipt of the legacy or inheritance, not on the legacy or inherited property itself. In the last two of the cited cases this proposition was

adjudged sufficient to support the tax, though in one of the cases it was imposed by the United States concerning a legacy to a municipality of a state and in the other of the cases the tax was imposed by a state concerning a legacy to the United States. If a tax upon transmission and receipt of a legacy does not legally fall upon the legacy, a tax upon a business (which lies back of transmission of any part of the business property or profits to its shareholders) is not a tax upon the stockholders' shares or income from their shares.

### III.

Finally, even a tax laid directly on corporate property is not a tax on the separate shares of the corporation's stock.

This is directly involved in—

*Owensboro National Bank v. Owensboro*  
173 U. S. 664.

*New Orleans v. Citizens' Bank*, 167 U. S.  
371.

*Home Savings Bank v. Des Moines*, 20  
U. S. 503.

In *Owensboro National Bank v. Owensboro* it was said:

It is, however, urged that whilst the tax may not be in form imposed on the shares or stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this

proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the States to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established will make the foregoing result clear (pp. 676, 677).



And again:

Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us, there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company v. Kentucky*, *supra*, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration (p. 683).

In *New Orleans v. Citizen Bank*, *supra*, it was said:

The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned. *Bank of Commerce v. Tennessee*, 161 U. S., 134, 146; 163 U. S., 416 (p. 402).

In *Home Savings Bank v. Des Moines*, *supra*, it was said:

One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro National Bank v. Owensboro*, 173 U. S. 664. There it appeared that a tax upon the intangible property of a national bank had been levied under the name of a franchise tax. Such a tax upon one of the agencies of the National Government is beyond the power of the State.

But it was contended that although the tax was not in form upon shares in the hands of shareholders (a tax lawful by the permission Congress has given), it was the equivalent of such a tax. To this contention the court, by Mr. Justice White, replied: [Repetition of substantially what is quoted above.] These words apply with equal force to the case at bar (pp. 519, 520).

The converse proposition, that a tax on shares is not a tax on the property of the company, is also settled.

*Van Allen v. Assessors*, 3 Wall. 573.

*People v. Commissioners*, 4 Wall. 244.

*Bradley v. The People*, 4 Wall. 459.

*National Bank v. Commonwealth*, 9 Wall. 353.

*Cleveland Trust Co. v. Lander*, 184 U. S. 111.

The chief practical question in these cases was whether taxation of the shares of a national bank is taxation of the property of the bank itself, with the result that the value of United States bonds (exempt from state taxation) owned by the bank should be deducted from the taxable value of the shares; and it was held that no deduction of the value of the bonds from the value of the shares was necessary, because taxation of the shares is not a tax on the bonds owned by the bank. The cases really rest, therefore, on the very proposition now important, *i. e.*, that the property of the company is not owned by the shareholders; so that taxation of that property is not taxation of the shares. Still more clearly, taxation of the business of the company is not taxation of the shares.

## THIRD.

The tax does not become direct in the special case of a company engaged mainly, or even solely, in the business of handling or dealing in real estate.

There are five cases at bar in which appellant is a shareholder of a corporation handling or dealing with real estate alone; though some of these companies seem to have charter power to do other things. These cases are: *Cedar Street Company v. Park Realty Company*, No. 757; *Brundage v. Broadway Realty Company*, No. 784; *Phillips v. Fifty Associates*, No. 797; *Mitchell v. Clark Iron Company*, No. 800; and *Cook v. Boston Wharf Company*, No. 819. The particular powers and activities of each company will be considered later (IV, *infra*), but the general considerations which affect them all must first be presented.

## I.

The *only new inquiry* that is necessary now, beyond what has been said in the First and Second Points, is *whether the stated companies are "carrying on or doing business,"* within the language of the statute. There is no new problem concerning the constitutionality of the statute; because, if the companies are conducting a business, that business may be made the subject of a tax as well as any other business, and the tax on the business is no more a direct tax upon property used in the business because that property happens to be real estate than in any other case. A tax on the business of buying and selling

dry goods or of renting horses and carriages (even without supply of a driver) is not a direct tax on the dry goods or the horses or carriages themselves; and, if so, why is a tax on the business of buying and selling or renting realty a direct tax on the land?

The specific nature of the question whether the tax under discussion falls upon the operations of these companies dealing in real property is not constitutional, but interpretative. Do those operations come within the statutory phrase "carrying on or doing business?" If so, the previous argument meets all constitutional objection. On the other hand, if any particular company is not conducting a business, it is not within the language of the statute; and it escapes the tax because the statutory language does not reach it—not because the statute in any respect is invalid.

## II.

The answer to the question whether a particular company is "carrying on or doing business" must be given on the special facts of each case. Exact statement of a general rule is probably impossible, as is often true in consequence of the complexity of human affairs.

Further, as the escape of any particular company from the tax must result from consideration of the nature of its particular activities and from a conclusion that those activities do not constitute a business, such avoidance of the tax by the particular company will rest upon grounds justifying the inap-

plicability of the tax to it; and therefore that result can have no possible influence upon the general validity of the enactment.

### III.

What is a business? The impracticability of a precise general response has already been confessed. A reference to the definitions of "business" in the leading lexicons will lead to only one valuable conclusion, viz, that the word "business" is of the widest import and embraces nearly all of man's activities with a view to procurement of a livelihood or derivation of profit. Beyond the fundamental idea that a business is for gain, however, three other elements perhaps may be indicated—

(1) A representation, in one way or another, to the public that the persons engaging in business propose certain activities; (2) a definite scope for those activities, however wide, instead of a mere unplanned and unconnected miscellaneousness of operations; and (3) an actual or intended continuity of action, instead of mere isolated transactions. These characteristics are not offered as the only or as minutely accurate determinants in all cases of the question whether a business exists; but it is submitted that when these general features are found, in a substantial and unmistakable way, they will manifest the existence of a business.

How is it then with corporations and joint stock companies? Their members form a *common purpose* of entering into activities of one or another kind; and

*that purpose is expressed* always and necessarily in articles of incorporation or association. The contemplated activities are given and must *follow a definite range*; which likewise is expressed in the articles of incorporation or association. The contemplated activities also are intended to be *continuous, or to form a connected series*, instead of being casual and distinct. How can it be said that a business does not result?

Looking in more detail to the formation of a corporation or joint stock company and to certain constant elements in their method of action, a business will inevitably be found. Union and cooperation of several in a single enterprise always exists except in corporations sole, which are not known to operate for profit. Each member of the corporation or joint stock company therefore really stipulates for and employs in some degree the judgment and effort as well as the capital of his cooperators. A mutual agency, in a wide sense, is always involved. The capital contributed by each is used with that supplied by others, and all of it is used for the benefit of all members of the corporation or joint stock company. That capital, with such accretions as it may receive in the course of operations, is tied to the undertaking both legally and practically—as already has been described—and can be withdrawn from the undertaking only by the consent of all or a definite part of the business proprietors through definite action to that end. Beside the mutual agency of those who undertake the enterprise, a

corporation or joint stock company involves the creation and employment of other agents, who conduct most of the affairs of the enterprise on behalf of its proprietors. The judgment and skill and labor of those general agents are utilized. Subordinate employees are used in the general operations, and often many of them. A definite direction is given to every act of the members of the corporation or joint stock company, and of their general agents and subordinate employees, by the nature of the corporation or joint stock company itself. Even dissolution of the enterprise is beyond the power of any individual, and must be decreed by consent of the requisite number. Is there anything in this situation which is like ordinary ownership or enjoyment of property? Can a tax upon the aggregated activities of the business proprietors and their agents and employees, with the aid of an aggregated and delimited capital, be viewed as a direct tax on property? And does it make any difference that all the activities and all the capital are employed about real estate instead of dry goods or the freight cars of a private car company (which rents them), or rented pianos, or billiard tables and bowling apparatus which the public use for hire?

The truth is that the very existence of a corporation or joint stock company—unless the company is not formed for profit—implies a business. *The formation of a corporation or joint stock company is founded upon an agreement to create a business.* There is no such difficulty in that case as may exist in reference



to the transactions of a single individual. Even a partnership for profit makes a business out of the contemplated operations of the partners, whether or not like operations by the individual partners separately would be a business. Any claim that a corporation or joint stock company is not in business disregards the character which the members of the corporation or joint stock company by agreement among themselves have given to their joint operations.

#### IV.

All of the companies considered in this point are admittedly corporations, have shares, and operate for profit. It is important, however, to consider their charters and operations in a little detail.

##### 1. As to the Park Realty Company (No. 757):

This company, according to the bill, was chartered—

to purchase or otherwise acquire, hold, own, maintain, *work, develop*, sell, convey, mortgage, or otherwise dispose of real estate and real property and any interest and rights therein; generally to purchase, take on lease or in exchange, hire or otherwise acquire any real *and personal property*, and any rights or privileges which the company may think necessary or convenient for the purpose of its business; to *erect, alter, or improve buildings*; to *conduct, operate, manage, or lease hotels, apartment houses, or warehouses*; to make, enter into, perform, and carry out *contracts for constructing, altering, decorating, maintaining, furnishing,*

*fitting up, and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners, and others; to carry on in all their respective branches the businesses of builders or contractors; to purchase for investment or resale, and to sell houses, lands, real property of all kinds, and any interest therein, and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and any other property, whether real or personal; to carry on any or all of the businesses hereinabove specified (Rec., 3).*

The italicized portions of the quotation from the bill are worth noting. It appears that the company has varied and broad powers of trading in real estate generally; continuous operations in those ways are contemplated; specific power is given to operate and manage hotels, apartment houses, and warehouses; the company may act as a building contractor or as a decorator and furnisher of all kinds of buildings; it may carry on "in all their respective branches the businesses of builders or contractors;" it may trade in personal property as well as realty; and the articles of incorporation expressly designate the company's operations as "the businesses hereinabove specified."

The bill states that the actual activity of the company at present relates to "the Hotel Leonori," and that the company "is engaged in no other business except the *management* and leasing" of that hotel. The bill therefore expressly pronounces the company's dealings with the hotel to be a "busi-

ness;" and, while the details of the matter are not shown, the company obviously reserves some power of management of the hotel.

2. As to the Broadway Realty Company (No. 784):

The bill says that the company "was formed for the purpose of owning, holding, and *managing* real estate" (Rec., 1). It owns an "office building" situated on Broadway "and also certain securities;" and it is "engaged in the business of *managing said building*," etc. (Rec., 1). The bill also admits these operations to be a business, saying that the company "is engaged in no other business whatever" (Rec., 2). Owners of office buildings, who let out the space in the building to numerous tenants, reserve large powers of management; and, beyond that, they regularly *furnish light and heat* beside the space, and they *perform much service for the occupants of their building, such as janitor service, elevator service, cleaning, and repairing*.

3. As to the Fifty Associates (No. 797):

The company is chartered to own real estate "with full power to build, improve, alter, pull down and rebuild, and to *manage*, exchange and dispose of the same" (Rec., 3).

The bill alleges "that the business of said corporation, so far as it may be called a business, is the holding and *managing* of the property aforesaid" (Rec., 3); and that property includes "such amounts of income as may from time to time have been set apart as surplus or reserved for working capital or such

income as may have been accumulated but not declared in dividends" (Rec., 3).

4. As to the Clark Iron Company (No. 800):

This company is alleged by the bill to have been chartered under and by virtue of the provisions of chapter 28 of the general laws of Minnesota for the year 1876 (Rec., 2). That statute is entitled "An act to authorize the formation of corporations for mining and smelting ores, and for manufacturing iron, copper, and other metals." Obviously, therefore, it allows incorporation only for a mining, smelting, or metal-manufacturing business. Section 1 of the act declares that "any number of persons not less than three, desiring to form a corporation for the purpose of mining or smelting ores, or minerals, or for both purposes; or for the purpose of manufacturing iron, steel, copper, or other metals, may do so upon complying with the provisions of this act." Section 3 provides that when the prescribed articles of association have been filed, "said corporation shall be deemed to exist under this act for the purposes specified in said articles as a *manufacturing and mechanical* corporation, under the constitution and laws of this state." (General Laws of Minnesota, 1876, p. 44.) By section 6 the stock of the corporation is expressly made personal property, as in the absence of contrary statute the common law is believed to do concerning all corporate shares. From all these provisions it is patent that the company can not lawfully exist except for a business purpose.

The bill alleges that the company owns various tracts of land and that it "some years ago made explorations for iron ore upon the lands hereinbefore described, or some portion thereof, and caused *explorations and developments* to be made thereon, resulting in the discovery of *large bodies of iron ore* in said premises, or some portions thereof" (Rec., 2, 3). The ore lands "have been leased to other parties or corporations *for the purpose of carrying on mining operations* thereon and taking out and removing iron ore" (Rec., 3); and therefore the lease contemplated, and doubtless directly required, mining operations through which the company gets an income "*on a royalty basis upon the iron ore mined and removed*" from the lands (Rec., 3). As the company's lease of the lands requires mining operations and those operations are done in substantial part for its benefit, because it receives a royalty dependent upon the ore mined, and indeed the property is being necessarily consumed in the course of the mining operations, a business evidently exists. In fact, the company's charter estops it to contend otherwise.

5. As to the Boston Wharf Company (No. 819):

It was chartered to acquire "certain lands and flats, with their privileges and appurtenances," and to "lease, *manage, and improve* its property in whatever manner shall be deemed expedient by it." (Rec., 2.) The charter also authorizes it to "receive dockage and wharfage for vessels laid at its wharves." (Rec., 2.) The bill states that it has an income "*in*

the maintenance and operation of its business and properties" (Rec., 2).

The transactions of this company therefore directly embrace the management and operation of a wharfing business. Reference here may be made to the decision in *Spreckels Sugar Refining Company v. McClain*, 192 U. S. 397, that wharfage charges received by the sugar company for the use of docks owned by it could and should be included in the computation of the gross income, which measured the excise on its business, though the tax was limited to the particular operations "of refining petroleum or refining sugar or owning or controlling any pipe line for transporting oil or other products" (pp. 410, 414, 415).

This very Boston Wharf Company was before the Supreme Court of Massachusetts in the cases of *Commonwealth v. Hamilton Manufacturing Company* and *Commonwealth v. Boston Wharf Company*, 12 Allen, 298. The litigated question was whether a tax on the excess of the market value of all the capital stock of the corporation above the value of its real estate and machinery was an excise upon the corporate franchise or a tax upon the corporate property, the court stating that under the constitution of Massachusetts the tax would be valid as an excise on the franchise but invalid if it was a tax upon property (p. 300). After a careful discussion of that question, it was concluded by the court that the tax was an excise on the franchise, and the following language of the opinion well indicates the funda-

mental difference between a tax on the corporate property and a tax on the results of the corporate business (to which the property contributes as only one of many factors):

The market value of the shares of a corporation, or the aggregate market value of all the shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a corporation, on its capacity to avail itself profitably of its franchise, and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value (pp. 302-303).

This language describes some of the many factors, apart from property, which determine the profits

or income of a business as truly as they determine the value of the corporate shares.

The various cases now at bar well illustrate how a business may exist none the less because real estate is chiefly or solely used in that business.

## V.

*Scholey v. Rew*, 23 Wall. 331, sustained a tax upon the "devolution of title in real estate," whether by "will, deed, or laws of descent;" and that case has never been overruled or questioned. If a single transaction with reference to real estate may be made the subject of an excise, surely continuous, varied, and extensive operations with reference to realty may be aggregated as a business and an excise laid thereon. The use of real estate in business may as well be made the subject of a tax when realty alone is used in the business as when both realty and personalty are so employed. It may be questioned, however, whether real estate ever is actually used alone in business; other funds quite universally, if not inevitably, are employed with it in the business.

What becomes of the stamp tax on deeds and conveyances of real estate if an excise can not be laid upon transactions involving real estate alone? Such taxes have never been overturned and seem never to have been questioned. The famous British Stamp Act of 1765 provided for a stamp tax of 1s. 6d. upon deeds and instruments conveying or assigning real estate within the Colonies. (5 George



III, c. 12; 26 Statutes at Large of England, 179, 183.) Of course such a tax is nothing more or less than a tax upon the transmission of realty. As early as June 9, 1794, Congress passed an act which shows that the public men of this country immediately after adoption of the Federal Constitution had no idea that a tax upon the sale of realty was a direct tax needing apportionment. That law provided for a tax "of one-fourth part of a dollar for every hundred dollars of the purchase money arising by sale at auction, of any interest, right, or estate in any lands, tenements, or hereditaments, and of any utensils in husbandry," etc. (1 Stat. 397, c. 65). By the act of July 16, 1866, it was provided: "Real estate agents shall pay ten dollars. Every person whose business it is to sell or offer for sale real estate for others, or to rent houses, stores, or other buildings or real estate, or to collect rent for others, except lawyers paying a special tax as such, shall be regarded as a real estate agent" (14 Stat. c. 184, p. 118). Recently the war revenue act of June 13, 1898, imposed a stamp tax upon every "deed, instrument, or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction" (30 Stat. 460). Another stamp tax was put by the same act on a "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof" (30 Stat. 461).

Beyond all this, the present tax is not laid on business conducted concerning real estate in ordinary ways and under ordinary conditions; it applies only to business when conducted in the special methods and with the peculiar advantages resulting from the special rules of law relating to a corporation or joint-stock company. Such question of uniformity as is involved through this fact will be treated later; but now the point is that transactions in reference to real estate may well be the subject of an excise when carried on under the peculiar conditions and with the special advantages which the law attaches to the operations of a corporation or joint stock company, even though like transactions by natural persons are not taxable. For a single example of the difference, the members of a corporation incur no liability, or only a limited liability, if the corporation makes a warranty deed.

The language of Mr. Chief Justice Fuller in *Thomas v. United States*, 192 U. S. 363, is here pertinent: "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates" (p. 371). *This case necessarily involves either that a tax by the United States upon the sale of property is not a direct tax upon that property or, at any rate, that a tax upon the sale of property in the exercise of special and peculiar privileges is not a direct tax on the property.*

The proposition that a Congressional tax on the transfer of property under conditions of special ad-

vantage is not a direct tax on the property was also expressly held in *Nicol v. Ames*, 173 U. S. 509; the tax in that case being laid upon the sale of "any products or merchandise at any exchange or board of trade, or other similar place" (p. 513).

#### FOURTH.

**The tax is not an infraction of the general power of the States to authorize the formation of corporations and joint stock companies.**

#### I.

This question is concluded by the authority of this court.

(a) It was directly involved and necessarily decided in

*Railroad Co. v. Collector*, 100 U. S. 595.

*United States v. Erie R. R. Co.*, 106 U. S. 327.

*Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

It is true that the question passed in those cases without contention by counsel or attention from the court. Nevertheless it was in the cases. The railroad companies in the first two of the cases were state corporations; and so was the Spreckels Sugar Refining Company. The tax in each case, as already shown, was on the business of the corporation; as is the present tax. No distinction can be made between the cited cases and the one at bar.

(b) The question was put forward in

*Veazie Bank v. Fenno*, 8 Wall. 533; 547.

After pronouncing the tax to be an excise on the business of the bank (which was a corporation of Maine), Chief Justice Chase, for the court, treated the matter thus:

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, *but property created, or contracts made and issued under the franchise, or power to issue bank bills.* A railroad company, *in the exercise* of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State

as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are *means of profit to the corporations which issue them*; and both, as we think, may properly be made contributory to the public revenue (pp. 547, 548).

The language which we have italicized is noteworthy. It shows that the question in hand was answered, in the cited case, by taking a distinction between taxation of corporate franchises themselves and taxation of things done under the franchises, *i. e.*, the actual use or exercise of the franchises. That distinction is maintained as to a strictly analogous question in the cases next to be cited.

(c) Little is left to be said after a consideration of *Knowlton v. Moore*, 178 U. S. 41; 59-61.

It was there contended against the Federal inheritance tax that the United States could not impose a burden on the exclusive power of the state to regulate, and indeed to create, the right of succession to a decedent's property. The court, through Mr. Justice White, answered:

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property

occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State can not be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are sub-

ject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheat., 316, 431), "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of

all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. The contention was adversely decided in the License Tax Cases, *supra*, where (p. 470) the court said: "We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued, for the defendants in error, that a license to carry on a particular business gives no authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must, therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed." The court, after thus stating the



argument, decided that the license was a mere form of excise taxation; that it conferred no right to carry on the business (the selling of lottery tickets and the liquor traffic) if forbidden to be engaged in by the State, but license was applicable whenever under the state law such business was permitted to be done. Many other opinions of this court have pointed out the error in the proposition relied on, and render it unnecessary to do more than refer to them (pp. 59-61).

The distinction once more is found between taxation of the state's legislative act in creating the right to inherit property (whether or not the designated person chooses to exercise that right) and the actual, beneficial exercise of that right by the person who elects to accept the inheritance. It is, the court says, "the exercise of such rights" created by the state that can be taxed by the United States. As further said by the court, the state regulates and really creates the right to make conveyances and contracts generally, and even the right to have property at all, but the actual use of the right regulated or given by the state, in the act of making a conveyance or contract or in the production or acceptance and enjoyment of property, may be taxed by the United States.

A corporate franchise is no more a creation of the state than is the right to inherit property. Indeed, it is no more a creation of the state than the right to make contracts and to have property. Specifically, on the very subject of business with which we are engaged, the right to do business under a corporate

franchise is no more a creation of the state than is the right to do business as a partnership. If a tax levied by the United States may be imposed upon the *use or enjoyment* of the right to do business as a partnership, or upon the *use or enjoyment* of the right to receive property by inheritance or to make contracts or to have property at all, such a tax may equally be levied upon the *use and enjoyment* of a corporate franchise. No distinction is possible.

(d) Other decisions of this court directly show the right of Congress to tax the exercise of privileges resulting from incorporation.

In *Thomas v. United States*, 192 U. S. 363, a Federal tax on transfer of corporate shares was upheld, and the court said:

The sale of stocks is a particular business transaction *in the exercise of the privilege afforded by the laws in respect to corporations* of disposing of property in the form of certificates (p. 371).

The particular corporation whose stock was subjected to the transfer tax was of state creation.

In *Nicol v. Ames*, 173 U. S. 509, the board of trade, upon the enjoyment of whose privileges the Federal tax was laid, was incorporated by Illinois.

## II.

While this tax is not on the corporate franchises, but on the exercise or use of those franchises, yet even a tax on the franchises of a state corporation is not a tax on the legislative power of the state or on the exertion of that power in an act of legislation.

1. A corporate franchise grows out of two things: (1) legislation by the state, which *offers* a franchise, and (2) *an act of free choice or election, in accepting the offer*, by persons to whom the offer is extended. The sole function of the state is in creating the *opportunity* for incorporation, either by special or by general offer of that privilege. The real act of incorporation, without which no franchise comes into being, is in the proceedings voluntarily taken by the private incorporators to avail themselves of that opportunity. Here we have a vital difference from ordinary and real legislation, which operates in given conditions without the consent of those upon whom it operates. For example, a statute that no man shall steal, or that hotels shall have external fire-escapes, operates or becomes effective by its own force alone. The law is complete in itself, and works its own results. To the extent of giving *opportunity* for incorporation, the same is true of a law allowing incorporation; but such law does not of itself create the corporation or any of its franchises. The corporation and its franchises arise from a supplementary and voluntary act of private persons. The state, in permitting incorporation, does not say that there *shall* be a corporation, but merely that there *may* be. Whether there shall be, in fact, rests in private choice. The corporation and its franchises therefore are ultimately and fundamentally created by the persons who decide to take advantage of the law which merely permits incorporation; just as a partnership is created by act of the persons who decide to form it under the permissive

rules of law. It could as well be said, therefore, that the United States can not tax a partnership contract—or, indeed, any other contract—as that it can not tax corporate franchises, on the theory that the state has the right to create and does create those franchises. The state has the right to *allow*, and does allow, their creation; but it has not the right itself to *create* the franchises, and does not in fact create them.

Even private persons, citizens of the legislating state, may therefore wholly prevent the existence of any business corporation, notwithstanding legislation by the state which allows their existence. Can not the United States then tax the act or the result of accepting offered franchises—because such tax may perhaps in some cases deter acceptance of the franchises—when individuals may and do act independently of the state in deciding whether or not a corporation shall in fact be made? May not the United States burden, if even private persons may wholly prevent, the actual existence of corporations or their franchises?

The reasoning of *Knowlton v. Moore*, 178 U. S. 41, 56-61, is again conclusive. It is as pertinent to show that Congress may tax the franchises of a state corporation as to show that it may tax the exercise or use of those franchises in the actual business. The corporate franchises, as we have just seen, do not arise directly or really from the state's legislative act, giving mere opportunity for incorporation,

but from the actual use of that opportunity by the persons who elect to incorporate. The corporate franchises are the outgrowth of the *use or exercise* by private individuals of the privilege of incorporation offered by the law; in the same way as receipt and enjoyment of a legacy or inheritance are the outgrowth or result of the *exercise* of the privilege of taking by *post mortem* succession, which is offered by the law.

2. No authority can be found that holds or even suggests that the United States cannot tax the franchises of a state corporation established for ordinary business purposes, on the theory that such Federal tax will interfere with the legislative independence of the states in their own sphere. The cases holding that a state cannot tax franchises or business of a bank created by the United States, or of railroads chartered by Congress, or of a telegraph company which (while incorporated by a state) has been made a governmental agent as well as an instrument of interstate commerce under Congressional legislation, are in no way pertinent in the present connection. Three distinct reasons so show—

(a) These cases are

- McCulloch v. Maryland*, 4 Wheat. 316.
- Osborn v. United States Bank*, 9 Wheat. 738.
- Thomson v. Pacific R. R. Co.*, 9 Wall. 579.
- Union Pacific Railroad Co. v. Peniston*, 18 Wall. 5.
- California v. Pacific R. R. Co.*, 127 U. S. 1.
- Telegraph Company v. Texas*, 105 U. S. 460.

In each of these cases the bank or the railroad or the telegraph company had been made, as this court expressly declared, *an agent of the United States Government for performance of governmental functions*. The cases therefore have nothing to do with the present general question, concerning the right of Congress to tax the business or franchises of state corporations doing the miscellaneous kinds of ordinary business. We shall make, in the Fifth Point (which immediately follows), the proposition that the cases just cited, though they show the bank, railroad and telegraph concerned in them to have been made governmental agents of the United States, fail altogether to show that banks, railroads and telegraph companies become governmental agents of the states in consequence of their incorporation by the states; but for the point now in hand that question is unimportant. We are dealing now with the general right of Congress to tax the business or franchises of state corporations in general; and the cases above cited are deprived of any bearing upon that question through the fact that they rested upon the relation of the bank, railroad or telegraph company to the United States as an agency for performance of governmental functions of the United States. Indeed, if any corporation can be formed constitutionally by Congress for mere private or business (as distinguished from governmental) purposes, the taxability of the business or franchises of such corporation by the states need not be disputed, except as the business of that corporation may happen

to be interstate. Chief Justice Marshall, in *Osborn v. United States Bank*, 9 Wheat. 738, admitted the right of a state to tax a Federal corporation operating for private trade or profit. He said:

The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation.

The whole opinion of the court, in the case of *McCulloch v. State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but can not breathe into it the vital spirit which



alone can bring it into useful existence. Let this distinction be considered.

Why is it that congress can incorporate or create a bank? This question was answered in the case of *McCulloch v. State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it can not, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. This distinction, then, has no real existence. To tax its facul-

ties, its trade, and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other (pp. 859-60).

(b) In the case of the railroads and telegraph company, whose franchises were held in the cited cases not to be taxable by a state, the decision was also compelled by the fact that such railroads and telegraph company were engaged in interstate commerce; and a state cannot tax even the business of interstate commerce, though Congress may tax the business of intrastate commerce notwithstanding the reserved rights of the states legislatively to regulate that business.

(c) Still another consideration is yet more general and vital. *It does not follow, and is not true, that the United States may not by taxation burden or hamper the operation of a state law, because a state may not by taxation burden or hamper the operation of a law of the United States.* The difference results immediately and simply from the supremacy of each power of the National Government over all powers of a state, whenever the two meet, and the correlative subordination of all state powers to each national power (Federal Constitution, Art. VI). For example, a state may enact an insolvency law, with provisions for discharge of debts, but such law must give way when Congress enacts a bankruptcy law. A state likewise may, in the absence of conflicting Congressional legislation, enact a law which in some way or degree affects interstate commerce; but that law

must fall when Congress legislates on the same subject. Especially—and with direct reference to the subject of taxation—a state tax law cannot burden or affect interstate commerce, because even the taxing power of a state is subordinate to the power of the nation to regulate interstate commerce; though, on the other hand, Congress can tax intrastate commerce, notwithstanding the reserved power of the state to regulate that commerce, because the taxing power of the United States is superior to the power of the state to regulate domestic commerce. Let us suppose, also, that both Congress and a state legislature impose a tax, as they may in well-nigh all cases, upon the same thing. Then the taxing powers of the United States and a state directly meet; and, if the thing taxed is not of sufficient value to yield both the amount of the Federal tax and the amount of the state tax, the supremacy of the national law will justify priority of the national tax claim over the state tax claim, with the result even that enforcement of the Federal tax may entirely defeat the state tax on the same thing. This is beyond argument; and it demonstrates, beyond possibility of doubt, that no inability of Congress to tax the business or franchises of a state corporation can be inferred from the inability of a state to tax the business or franchises of a Federal corporation.

This very question was considered by this court at the outset of the discussion concerning the power of a state to tax the operations of a Federal corpora-

tion; and Chief Justice Marshall said in *McCulloch v. Maryland*, 4 Wheat. 316:

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme (pp. 435-436).

On all three of the grounds just stated it therefore appears that the adjudications of this court concerning state taxation of the business or franchises of a corporate agent of the United States are irrelevant to the question of the power of the United States to tax the business or franchises of miscellaneous corporations formed under state laws.

### III.

The case of *South Carolina v. United States*, 199 U. S. 437, is decisive of this question whether Congress may tax the business or franchises of an ordinary state corporation, as under the next Point it will also show the power of Congress to tax business activities of a state itself.

In that case the internal revenue tax imposed by Congress on retail dealers in liquors was held collectible on such business when conducted by the state of South Carolina, through its own agents and for its own account. If the activities of a state itself in ordinary business may be taxed by the United States, *a fortiori* may like activities of private persons for their own profit be taxed by the United States, though they are conducted under a special form of organization and with the advantage of special legal rules of right and obligation, which the state (with the consent of the business adventurers) extends to the business.

## FIFTH.

The business of public service companies, such as railroad, street railway, telephone, telegraph, light, water, heat and power companies, is not intrinsically an operation of the state which created the company; and in no case at bar is the state shown, through any peculiar relations established between itself and the public service company, to have made the business of the company its own. Further, the United States may tax even a business conducted for or by a state itself.

The claim to which this point will respond is that in taxing the business of a railroad company or other so-called public service company—such as a street railway, telegraph, telephone, gas, water, electric light, heat or power company—the United States taxes the operations of an instrumentality created by the state for the performance, or at least for assistance to the state in the performance, of a function which is the state's own, either because that function necessarily belongs to the state or because the state has actually assumed that function; and that such a tax, burdening a legitimate operation of the state itself, is incompatible with the reserved sovereignty of the state. There are several answers to this claim:—

## I.

The operation of a railway, street railway, telegraph or telephone line, gas, water, electric light, heat or power plant, and so forth, is not an intrinsic function of the state; nor has it actually been assumed as one of its own functions by any of the states which incorporated the so-called public service corporations whose cases are at bar.

We will present separately the two branches of this first answer.

1. Such business is not an intrinsic function of the state. Several considerations make this plain.

(a) The only operations which can be considered to belong exclusively to a state, with the result that nobody but the state can perform them, are the enactment of laws, the interpretation and application of laws, and the execution of laws. These operations are the essential business of the three fundamental branches of government—its legislative, judicial and executive departments. Nobody but the state can make laws or interpret and apply them or execute them; but other activities than these do not rest upon the state as a necessary consequence of the nature of the state, and may be left by the state to others than itself.

(b) If the operation of a railroad or the conduct of any other business, such as the so-called public service companies transact, were essentially a function of the state, then that business could not be done by anybody—whether a corporate or a natural person—without the consent of the state. Private persons, however, may engage, without incorporation and without assent of the state in any form, in the business of operating a railroad or telegraph or telephone line, or of supplying water, light, heat or power to the public generally.

*1 Rorer on Railroads*, Sec. 2, p. 8.

*1 Elliott on Railroads*, Sec. 1, p. 1.

*McKee v. G. R. Street R. Co.*, 41 Mich. 274, 279.

*Moran v. Ross*, 79 Cal. 159 (21 Pac. Rep. 547).

*County of Santa Clara v. Southern Pac. Ry. Co.*, 18 Fed. 385, p. 433.

*Henderson v. Ogden City Ry. Co.*, 7 Utah, 199 (26 Pac. Rep. 286).

*Bank of Middlebury v. Edgerton*, 30 Vt. 182.

*Lawrence v. R. R. Co.*, 39 La. An. 427.

*In the matter of Kerr*, 42 Barb. 119.

Indeed, the operation of a public hotel is as much a public business as is any public service company's business. So is the operation of grain elevators or of stock yards, each of which this court has adjudged to be a business "affected with a public interest." Can it be supposed that the assent of a state is necessary before private persons can enter upon such business?

(c) If *any one* of the many kinds of business transacted by public service companies—such, for example, as the operation of a railroad or a telephone—is necessarily a state function, so equally are *all*. No difference can be found in the degree of their usefulness or importance to the community that will justify considering one of these businesses to be a state function and others to be open to all who may choose to engage in them. The idea that the business of a public service company is necessarily a function of the state needs refutation, therefore, in the absurd extent to which the idea would have to be carried.

(d) If any such business, because of its very nature, belongs necessarily to the state, it must also result that the conduct of such business by unincorporated,



natural persons is an activity of the state itself. Mere incorporation will not make that a state function which is not the state's work if it is done without incorporation; and the fact that the persons who are conducting the particular business are unincorporated can not take away from that business the quality of a state operation if that business through its nature belongs to the state.

(e) Nor does the fact that the business of a railroad or of a telephone line or of a gas company is "affected with a public interest," so that its charges may be regulated by the state, and is for the "public use," so that private property may be taken by eminent domain for the uses of the business, show that the business is an activity of the state. Those special characteristics of "public-service" business neither result from nor lead to a view that the business is done by the state itself. Both the right of all members of the community to have the benefit of using a railroad or a telephone line or a gas company's plant, and the right of the state to regulate reasonably the terms on which all members of the community may use the railroad or the telephone line or the gas company's plant result from the fact that the persons who enter upon such a business *hold themselves out* as a common carrier or a transmitter of messages for the public or a purveyor of gas to the public at large. The origin and foundation of their general obligations to all persons alike were described by this court in *Munn v. Illinois*, 94 U. S. 113, as follows:

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Har. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control (pp. 125-126).

The public character of the business proceeds therefore from the act and announcement of those who engage in it—not from any view that those persons are acting as agents of the state in performing a function which belongs to the state. Further, the power of the state to regulate the charges of the

business comes from the agreement of those engaged in it to do that business for the benefit of all members of the community; since such an agreement would be illusory unless it included the stipulation that the business would be done upon reasonable terms. The offer to work for all would mean nothing if the terms upon which the work should be done could be made as exorbitant as the offering party might choose. Likewise—just as the right of any member of the community to participate in the benefit of any business “affected with a public interest” and the right of the state to regulate that business do not grow out of its being a function of the state—the public character of the business and the right of the state to regulate it do not lead to a conclusion that such business is a function of the state. The stated origin of those special incidents of the business forbids any such inference from their existence; and, beyond that, the ability of the state to regulate such business in the interest of all members of the community is in itself ample reason why the state need neither have nor take upon itself the function of doing such business.

(f) If the conduct of a railroad or of a telegraph or telephone line were a state function, from the very nature of the business, it would follow that in regulating the interstate transactions of the railroad or telegraph or telephone line the United States is interfering with a function and activity of the state. This leads inevitably to the dilemma—either horn of which is sufficient to dispose of the contention that

Congress cannot tax the transaction of business by a railroad or telegraph or telephone line incorporated by a state—that (1) the conduct of a railroad or telegraph or telephone line is not an activity of the state which incorporated the company, or that (2) Congress may interfere with that activity under its power to regulate interstate commerce. The taxing power of Congress is no less than its power to regulate commerce; and therefore it may be said at once, in anticipation of the other branch of this matter, that Congress by a tax can interfere with an activity of a state in conducting a railroad or telegraph or telephone line, *unless its recognized power of interference with the interstate transactions of the railroad or telegraph or telephone, under the commerce clause of the Constitution, is better explained by the fact that the business of the railroad or telegraph or telephone company is not an activity of the state.*

2. The states which incorporated such public service companies as are at bar have not in fact assumed the business of such companies as a function and activity of the state.

(a) The mere fact of incorporation of the persons doing business does not involve assumption of that business by the state. Incorporation does not alter the nature of the business so as to make that a governmental function which without incorporation is not. If it did, every business done by a corporation would at once become an operation of the state. That is absurd. Also, the contrary is involved in

*Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, and in *Veazie Bank v. Fenno*, 8 Wall. 533; unless indeed these cases involve more, viz, that the United States may tax the business of a corporate agent of the state. The two companies, whose business was rightly taxed by Congress under the decisions in those cases, were incorporated by Pennsylvania and Maine, respectively.

(b) It is true that incorporation by Congress makes the corporation in some way or for some purpose a governmental agent of the United States; but that does not involve the merely apparent converse that incorporation by a state makes the corporation an agent of the state. Congress has merely an *incidental*, not a primary or independent, power to create corporations; but a state has general and independent power to allow incorporation, the exercise of which may be wholly unrelated to any other power of the state. Specifically, Congress cannot create a business corporation except in aid of its power over interstate commerce, and cannot create a railroad corporation except in aid of that power or of some other strictly governmental power, such as the carriage of the mails or of the armies of the United States. It follows that an act of incorporation by Congress cannot be valid unless the corporation is created as an instrument for furtherance of the governmental powers of the United States. That is the general and fundamental ground on which an act of Federal incorporation, if it is to stand at all, shows that the

corporation is an agent of the United States; and that principle underlies

*McCulloch v. Maryland*, 4 Wheat. 316.

*Osborn v. United States Bank*, 9 Wheat. 738.

*Thomson v. Pacific R. R. Co.* 9 Wall. 579.

*Union Pac. R. R. Co. v. Peniston*, 18 Wall. 5.

*California v. Pacific R. R. Co.* 127 U. S. 1.

No like principle affects incorporation by a state. It may be granted, and of course commonly is granted, without the slightest connection of the corporation with the operations of the state government.

Further, the case of *Reagan v. Mercantile Trust Company*, 154 U. S. 413 (pp. 416, 417), suggests that even incorporation of a railroad company by Congress does not relieve that company's intrastate business from control or taxation by the state in which that business is done. It was there held that the state of Texas could regulate the rates of a Federal railroad corporation on local business in Texas. In such business local to a state a Federal corporation may well be said not to be a governmental agent of the United States, though it is such agent in doing interstate business or in carrying the mails or armies of the United States; because in doing intrastate business the railroad is not acting as an instrumentality created by Congress in furtherance of its own governmental powers. More plainly still, however, a railroad chartered by a state need not be, and certainly in all ordinary circumstances is not, an instrumentality created by the state in aid of its governmental operations.

## II.

Even if a state should actually assume the operation of a railroad, whether directly or indirectly through a special corporate agency, or should assume to do any other kind of business, the operations of the state in the business would be taxable by the United States.

1. This is settled by

*South Carolina v. United States*, 199 U. S. 437.

It was there held that the business of the state liquor dispensary of South Carolina could be taxed by the United States though it was conducted by and for the account of the state itself. The distinction between those operations of a state which the United States may not tax and those other operations of the state which the United States may tax rests upon the difference between the fundamental and essential activities of a state, which grow out of its very nature and by which it accomplishes what it alone can do, and other activities which have merely a business character, though the state assumes them in some regulative purpose.

Mr. Justice Brewer, for the court, said, in the *South Carolina* case, concerning the limitation upon the United States and states implied in the Constitution:

Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution,

that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it (pp. 451-452).

And, concerning the extent to which the states may go into business if they see fit and the consequent restriction of the taxing power of the United States if business done by a state should be held free from Federal taxation, it was said:

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance v. W. A. Vandercook Co.*, No. 1, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million dollars. *Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleo-margarine, and all other objects of internal revenue tax.* If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. *There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system.* Would the State by taking into possession these public utilities lose its republican form of government?

We may go even a step further. *There are some insisting that the state shall become the owner of all property and the manager of all business.* Of course, this is an extreme view,



but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

*Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National*

Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch v. Maryland*, *supra*, (p. 431), for a complete answer:

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the Nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its

functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. *What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a State may be carried had then no hold.* Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on the preservation of the rights of the States, they had no thought that those States would extend their functions beyond their then recognized scope, or so as to imperil the life of the Nation. As well said by Chief Justice Nott, delivering the opinion of the Court of Claims in this case (39 C. Cl. 284).

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Looking, therefore, at the Constitution in the light of the conditions surrounding at the

time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that the power should be complete, and never thought that the States by extending their functions could practically destroy it (pp. 454-457).

It must be always remembered that the right of South Carolina to enter into the liquor business was sustained by this court in the view that the state's assumption of the business was a legitimate exercise of its police power to regulate the liquor traffic in the interest of the health and welfare of its citizens; and therefore the business was assumed by the state as a means of effecting a regulative purpose.

*Vance v. W. A. Vandercook Co.* No. 1, 170 U. S. 438.

Dissenting opinion in *South Carolina v. United States*, 199 U. S. on pp. 464, 472.

If, then, a state enters into the business of running a railroad or a street railway or of operating a telephone or telegraph line or of supplying gas, electric light, heat or power to its citizens, it certainly will no more be exercising a governmental power than South Carolina was, in taking on the liquor business.

2. We have already argued (pp. 87-89 *ante*) that each power of the United States is superior to the reserved powers of the states, so far as the two come into conflict; and that, consequently, it does not follow from the mere fact that a law of the United States may hamper some operation of a state that the Federal law is invalid. No state law can hamper

the operations of the United States, because the powers of the states are subordinate to the national power; but the converse is not true—at any rate in every case. The illustration of a Congressional tax and a state tax put upon the same thing may be recalled. If the value of the thing taxed is insufficient to yield more than the Federal tax, the United States may take it all in satisfaction of its tax, though the state tax is thereby entirely defeated. If then even a power of the state so fundamental as its taxing power may be hampered by the taxing power of the United States, is there difficulty in concluding that the taxing power of the United States may be exercised though the tax will trammel some business upon which the states embark?

3. Finally, if the state itself operates a railroad or a telegraph or telephone line, may not the United States, under its power to regulate commerce, control or interfere with the interstate transactions of the state upon its railroad or telegraph or telephone line? And if the business activities of a state may be regulated by the United States under the commerce clause of the Constitution, are those activities beyond all reach of the still more fundamental, taxing, power of the United States?

### III.

While the power of the United States to tax the business of a railroad company chartered by a state seems not to have been questioned heretofore in this

court, it was directly involved and impliedly sustained in

*Railroad Co. v. Collector*, 100 U. S. 595.

*United States v. Erie Railway Co.*, 106 U. S. 327.

The railroad company concerned in each of these cases was incorporated by a state and the tax was held to be an excise upon its business.

#### IV.

If the business of a public service company, incorporated by a state, could be deemed an activity of the state itself, and even if such activity of the state could be held to be beyond the taxing power of the United States unless the state should assent to the tax, still such assent by the state to taxation of the business by the United States would be inferred in the absence of legislative declaration to the contrary by the state.

This is involved in

*Reagan v. Mercantile Trust Co.*, 154 U. S. 413.

The Texas & Pacific Railway Company, incorporated by Congress, was there held to be subject to regulation by Texas in respect of its rates upon its local business in Texas. As already suggested, that result could well follow from considering the railroad company not to be acting as an instrumentality of the United States in its mere intrastate business—so that regulation of the local business in Texas was not an interference with any operation of an agent of the United States; but this court, conceding for the purpose of the argument that the state of Texas could not tax even the local business of the railroad

in that state without the consent of Congress, went on to say:

Similarly we think it may be said that, *conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it*, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. *Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to*

*the ordinary control exercised by the State over such business.* Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of *taxation*, rates, and other police regulations (pp. 416, 417).

It is no more difficult to infer, from the silence of the states in reference to Federal taxation of the business of miscellaneous public service companies, that the states have contemplated and given their assent to such taxation.

#### SIXTH.

**The tax is not imposed upon state or municipal bonds, or upon the income of such bonds, forming part of the business assets of the company whose business is taxed; and the company's income from such bonds is to be included in the computation of its net income.**

It is admitted, of course, that the bonds of a state or of a municipality of a state cannot be made the subject of a Federal tax; nor can the income from such bonds.

*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; 583-586.

This is because the issue of such instruments of public credit is "an essential element of the sovereignty" of the state (*Pollock* case, p. 585). But that rule is not applicable to the present case. The



tax here involved is *not on the bonds or on their income, but is on the business* of the company which holds the bonds as part of its business assets, *and the income from such bonds as well as from the company's other business assets and activities is used only as a measure* of the amount of the tax on the business. This has already been treated.

The validity and sufficiency of this distinction between a tax on business and a tax on property are clear in principle, and the distinction is supported by many analogies which might be mentioned—as, for example, the fundamental contrast between an excise on business and a direct tax on property, and the rule that a tax on the shares of a national bank is not a tax on the property of the bank. Such collateral arguments need not be developed, however, as the decisions of this court amply cover the exact point in hand.

1. State taxation of the business of a bank, measured by its deposits, is not a tax on bonds of the United States, though the deposits are invested in such bonds.

*Society for Savings v. Coite*, 6 Wall. 594.

*Provident Institution v. Massachusetts*, 6 Wall. 611.

State taxation of the business of a bank, measured by the excess of the market value of the bank's capital stock above the value of its real estate and machinery, is not a tax on bonds of the United States in which the capital is invested.

*Hamilton Co. v. Massachusetts*, 6 Wall. 632.

2. A Federal tax of ten per cent. "on the amount of notes of any town, city or municipal corporation, paid out" by a national or state bank is not a tax on the municipal notes themselves.

*National Bank v. United States*, 101 U. S. 1.  
*Veazie Bank v. Fenno*, 8 Wall. 533.

As stated by Chief Justice Waite in the former case—

The tax thus laid is not on the obligation, but on its use in a particular way (p. 6).

3. A tax upon the "franchise or business" of a corporation or joint stock company, measured by its dividends, is not a tax upon bonds of the United States, though the capital of the company is invested in such bonds.

*Home Insurance Co. v. New York State*, 134 U. S. 594.

4. A tax of the United States on the inheritance of state bonds is not a tax on the bonds themselves, though their value measures the tax.

*Murdock v. Ward*, 178 U. S. 139.

In like manner, a state tax on the inheritance of United States bonds is not on the bonds themselves, though their value measures the tax.

*Plummer v. Coler*, 178 U. S. 115.

5. A state tax on shares of a national bank is not a tax on bonds of the United States in which the capital of the bank is invested.

*Van Allen v. Assessors*, 3 Wall. 573.

*People v. Commissioners*, 4 Wall. 244.

*Bradley v. The People*, 4 Wall. 459.

*National Bank v. Commonwealth*, 9 Wall. 353.

*Cleveland Trust Co. v. Lander*, 184 U. S. 111.

6. An analogy may be found in *Ficklen v. Shelby County Taxing District*, 145 U. S. 1.

It was there held that a license tax exacted by Tennessee from factors, brokers and buyers or sellers on commission doing business in the state could be collected from particular brokers who in a given year negotiated only sales of goods to be brought into Tennessee from another state, though the tax was measured by the amount of the factor's or broker's commissions. Similarly, a license imposed by a state upon liquor dealers generally is held properly chargeable (without reduction or apportionment) against liquor dealers making both domestic and interstate sales.

*Tiernan v. Rinker*, 102 U. S. 127.

No difficulty arises from the cases holding that a state tax directly levied on the property of a bank is invalid so far as it falls upon bonds of the United States forming part of that property. For example—

*Weston v. City Council of Charleston*, 2 Pet. 449.

*Bank of Commerce v. New York City*, 2 Black, 620.

*Bank Tax Case*, 2 Wall. 200.

In *Bank of Commerce v. New York City* the court said:

According to that system of taxation [i. e., which determined the amount of the tax by the nominal capital of the bank without

regard to its actual value at the time of taxation] it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed that the tax is upon the property constituting the capital (p. 629).

Of the *Bank Tax* case this court later said:

Nothing more was decided in the *Bank Tax Case* than that a tax levied under a law of the State which enacted that all banks and banking associations should be liable to taxation on a valuation equal to the amount of their capital paid in or secured to be paid in, and their surplus earnings, in the manner provided by law, was a tax on the property of the complaining bank, and that inasmuch as the capital of the bank consisted of public securities, declared by act of Congress to be exempt from taxation, the law imposing the tax was unconstitutional and void. (6 Wall. 629.)

In the *Pollock* case, 157 U. S. 429, the direct subject of the tax was the income from state bonds as well as from other property, held as an investment; and the tax was not upon the conduct or transaction of a business, but was independent of the employment of the bonds or other property in business.

## SEVENTH.

**As an excise, the tax is uniform under clause 1 of section 8 of Article I of the Constitution of the United States, though it is laid upon other kinds of business than insurance only when the business is conducted by a corporation or joint stock company having shares of stock; and the imposition of the tax upon the business of such corporations and joint stock companies, while the kindred business of individuals and partnerships is not taxed, does not take property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and does not contravene any rule of equal legislation implied from the nature of the National Government.**

## I.

It is already settled that the constitutional requirement of uniformity in "all duties, imposts and excises" imposed by Congress (Clause 1 of section 8 of Article I of the Constitution) calls for no more than geographical uniformity.

*Knowlton v. Moore, supra.*

On that ground it was held in the cited case that the Federal inheritance tax of 1898 was uniform, though it exempted legacies and distributive shares of \$10,000.00 or less, and though the rate of tax varied largely with the degree of kinship between the decedent and the recipient of the legacy or distributive share, and though the rate of tax also varied largely with the amount of the legacy or distributive share; the rate of tax in some cases being, as a result of these two rules of variation, over twenty times as high as in other cases.

## II.

It would seem to follow from *Knowlton v. Moore* that the only inquiry open in the courts concerning an alleged Federal excise is—beyond its geographical uniformity—whether the charge is in its true nature a tax at all; for example, whether it is imposed for a public purpose or whether, instead of being a tax, it is a mere arbitrary taking of property under the false semblance of a tax. Concretely, it would seem that a tax imposed in like way and amount under *identical* circumstances, in all parts of the United States, is uniform, and that omission to impose the tax under circumstances differing in *any* real way from the circumstances in which the tax is imposed cannot create a lack of uniformity; though the difference in circumstances be of the slightest.

It is contended in this case, however, as it often has been contended in other cases, that the Fifth Amendment to the Constitution, which prohibits the taking of property without due process, or the essential nature of a free and republican government demands some other than merely geographical uniformity in Federal taxation. It is difficult to see how more can be requisite, either under the Fifth Amendment or in consequence of the nature of our Government, than that what is called a tax be in truth a tax—instead of mere, palpable spoliation. The Constitution having expressly prescribed, both as to direct and indirect taxes, such rule of uniformity as its makers and the people who ratified it thought

necessary and sufficient, viz, as to direct taxes, apportionment among the states according to population, and, as to indirect taxes, geographical uniformity, can any other rule of uniformity in what by its nature is a tax be implied in the Constitution? This question has been put by this court itself. In *District of Columbia v. Brooke*, 214 U. S. 138, the question was made in this way:

The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States v. Delaware & Hudson Co.*, 213 U. S. 366, that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power." In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and

always one of the least limitable of the powers of government (p. 149).

But for this language, which of itself strongly suggests that the express constitutional rules of uniformity in taxation exclude an implication of different rules, *Knowlton v. Moore* might well be taken as decisive; especially as, in *Patton v. Brady*, 184 U. S. 608, when again considering the uniformity of a Federal excise, this court said:

Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final (p. 623).

Likewise, in *United States v. Singer*, 15 Wall. 111, *Knowlton v. Moore* was fully presaged. Counsel in that case (as their briefs show) insistently raised and debated the question whether any other than geographical uniformity is required in an excise; and the court, responding to that debate, said—

The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be “uniform throughout the United States.” The tax



here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike (p. 121).

The maxim *expressio unius est exclusio alterius* applies with peculiar force to a constitution. Restrictions upon legislative discretion, beyond what the Constitution clearly establishes, cannot easily be recognized by the courts. Judicial inference of a restraint upon the act of a coordinate branch of the government, in legislation, is far different from like inference of a restraint upon private action imposed by the legislature. No such weight of unavoidable reason is necessary for the latter as is indispensable to the former.

Nor could the case well be stronger than it is for holding that the Constitution leaves all questions of tax uniformity to Congress, if only the charge be what is a tax in the general conception of civilized nations and the kind of uniformity expressly required by the Constitution exist. In the first place, direct taxes, on the one hand, and duties, imposts and excises, on the other hand, embrace all kinds of tax; and therefore the Constitution has applied an express rule of uniformity to every kind of Federal tax. In the second place, in all the controversy over the ratification of the Constitution the sufficiency of the expressly required uniformity in taxation does not seem to have been assailed. In the third place, when the amendments which grew out of the controversy over the

ratification of the Constitution were adopted, no nearer approach was made to the subject of taxation than the provision about due process in the Fifth Amendment. It is inconceivable that, if anything more than was expressed in the Constitution was desired to assure uniformity of taxation, some specific language on that subject, or at least some direct reference to the topic of taxation, would not have been inserted in the amendment. Finally, in the course of the proposal and adoption of all subsequent amendments to the Constitution, the original treatment of taxation has been left unchanged.

A practical answer, at any rate, has been given by this court to this question of the exclusiveness of the rule of geographical uniformity as to Federal excises. In no case has a congressional classification of persons or things for taxation been adjudged improper. The kinds of Federal excise imposed by Congress have been many, and the bases of Congressional choice, either of the subject of tax or of the applicable rate, have been sometimes slight and peculiar; controversy over them on this very point of uniformity has been frequent; and all have been sustained.

### III.

However the court may view the question of the existence of any other than the express constitutional rule concerning uniformity in excise taxation, it must at least be true that any implied rule of uniformity will no more confine the discretion of Con-

gress in deciding what or how it will tax than the general language of the Fourteenth Amendment, prohibiting denial of the equal protection of the laws by a state, confines the state legislatures in their taxing discretion. In *District of Columbia v. Brooke*, 214 U. S. 138, this court said, after querying whether any other than the express rule of uniformity can be recognized:

However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for *whether such power is expressly or impliedly prohibited, the prohibition can not be stricter or more extensive than the Fourteenth Amendment is upon the States*. That Amendment is unqualified in its declaration that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that *such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates*. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws, *Billings v. Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al. v. Worst*,

207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John v. New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field v. Barber Asphalt Co.*, 194 U. S. 618, where a privilege to protest against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statute held not to violate the equality clause of the Fourteenth Amendment. See *Travelers Ins. Co. v. Connecticut*, 185 U. S. 364 (pp. 150–151).

It is to be remembered, too, that, beside the Fourteenth Amendment, the Constitution contains the provision of section 4 of Article IV that “the United States shall guarantee to every State in this Union a republican form of government;” and that must

contemplate as much in reference to state taxation as the republican character of the National Government entails concerning national taxation.

#### IV.

With so much premised, it is time to consider the *exact question* of uniformity presented by the imposition of an excise on business done under the special conditions which surround and with the special advantages which attach to such business when it is transacted under the exceptional legal rules applying to corporations and joint stock companies, without imposition of the tax upon kindred business done under the different conditions and rules applying to individuals and ordinary partnerships. First let it be noted, however, that, if there be any such thing as a corporation or joint stock company not "having a capital stock represented by shares", the tax does not fall upon that company's business; and it will then appear at once that the important things which, on the one hand, differentiate the business of a corporation or joint stock company that is taxed under this act from similar business of individuals or a partnership make natural and justify, on the other hand, the classification of the business of a joint stock company with like business of a corporation in the taxed group of businesses.

1. The existence of transferable shares in the business and its property leads at once to an escape from the embarrassing consequences of the rule that there is a *delectus personarum* in a partnership. When, by

organizing either under a statute concerning joint stock companies or under the common law a business association with transferable shares, the business adventurers agree together that there may be indefinite substitution of new co-adventurers, the rule that a partnership is dissolved by death or bankruptcy of any partner or by transfer of his interest ceases to be applicable to the business, because the element of personal trust between the partners disappears. The immediate result is that a joint stock company, like a corporation, is not dissolved and its business remains unaffected by the death or bankruptcy of a stockholder or by a transfer of his shares. In this fundamental characteristic, therefore, the business of a joint stock company is done under the same conditions and with the same advantages as the business of a corporation; and the mere fact that the law views a corporation as having a new collective personality, while a joint stock company has not (in all cases; though under statutes it may have a sort of separate personality), is of no influence to distinguish a corporation from a joint stock company in respect of the continuity of its business notwithstanding changes in its membership. The existence of transferable shares in a corporation or joint stock company, with the resultant opportunity for a numerous membership and frequent changes of membership, also leads inevitably to the practical result, exemplified on all hands, that the management of the business of a corporation or joint stock company does not remain with the business adventurers themselves, as in a partner-

ship, but passes to special agents of the corporation or joint stock company (such as directors, trustees and general executive officers) created by the business proprietors in special ways and exercising peculiar powers, with the result that their transactions are governed by exceptional rules of law. Further, the other fundamental and highly advantageous feature which distinguishes the business of a corporation from that of individuals or a partnership, and which equally assimilates the business of a corporation and the like business of a joint stock company, is that the existence of transferable shares in the business and its property makes the tenure of the business property continuous and independent of changed membership in the corporation or joint stock company and independent also of changes in the circumstances of its members; so that the title of the business property, whose ownership depends upon the possession of shares, is unaffected (like the business enterprise itself) by the death or bankruptcy of any member of the corporation or joint stock company or by the transfer of his shares.

These things, which characterize the business of a corporation or joint stock company and differentiate it from that of individuals or a partnership, cannot be overestimated. Their existence alone makes possible the great and extended business enterprises of modern times. They alone make practicable the aggregation of large masses of capital in a single undertaking; and they alone assure the continuous use of the aggregated capital in an uninterrupted

enterprise. Argument on this is unnecessary. The practice of the world admits it. The rapid and almost unbounded multiplication of corporations and joint stock companies is due to their possession of the exceptional advantages which have been mentioned. No man to-day attempts, or can attempt, any large business project without the aid in the business of the special incidents, primarily legal but consequentially and controllingly practical, attending business done under the organization and with the special features of a company having transferable shares.

The business of a corporation is done under the further important advantage that its members are under no liability, or under a limited liability, upon corporate obligations; while individuals and partners in business are each liable *in solido* for the business debts. This is a great advantage, and would of itself suffice to justify a tax upon corporate business without its imposition upon kindred business done by individuals or a partnership. That advantage does not attach in the business of a true joint stock company; but that fact cannot at all lessen the importance or sufficiency of the differences already shown between the business of a joint stock company and the business of individuals or a partnership. The situation is simply that there is one more reason for differentiating corporate business from ordinary business than exists for like differentiation of the business of a joint stock company from ordinary business. That does



not prove the bases for differentiation of the business of a joint stock company from ordinary business to be inadequate. Indeed, the advantages peculiar to both corporations and joint stock companies, in contrast with ordinary business, are far more fundamental than the mere corporate incident of limited liability. The latter simply lessens individual risk in the enterprise, and so undoubtedly makes the enterprise more attractive to investors; but the common features and advantages of both corporations and joint stock companies give more than attractiveness to the enterprise; they alone make it possible as a large and lasting project.

The propriety of classifying corporations and joint stock companies together, for like taxation, is illustrated, and indeed concluded, by *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566.

That case held an association of Great Britain to be a corporation, though its members were under unlimited liability for the business debts; with the result that a business tax could be put upon it by Massachusetts in an amount greater than was put upon the like business of companies created in another state or in Massachusetts. Mr. Justice Bradley, concurring in the result, held the company to be "one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid" (p. 576). The difference does not affect the application of the case to our present question. If the

English company was a corporation, that conclusion shows that the fundamental likenesses which we have enumerated between a corporation and a joint stock company make unimportant their difference in respect of personal liability of their members. On the other hand, if this English company was a joint stock company, it then results that such a company may be taxed by a state in a discriminating way, because it is not, like natural persons, within the protection of section 2 of Article IV of the Constitution entitling the citizens of each state to all privileges and immunities of citizens in the several states.

Nor is it material, for the present case, whether or not the act under discussion taxes joint stock companies formed with transferable shares under the common law (as they may be; *Palmer's Company Law*, 4th ed., pp. 4-6; 2 *Cook on Corporations*, 6th ed., §504, p. 1364; *Phillips v. Blatchford*, 137 Mass. 510) or taxes only joint stock companies formed under a statute. The construction of the act in that respect depends upon the meaning of the words "organized under the laws" of the United States or a state or territory or Alaska or the District of Columbia or a foreign country. Inasmuch as, beyond doubt, joint stock companies having transferable shares may be formed under the common law, with most if not all of the special features and advantages which attach to statutory companies, we believe it beyond reasonable dispute that a joint stock company formed at common law is liable to the tax; because its business possesses the special qualities and

advantages which bring it within the reason of the statutory classification. The words "organized under the laws," etc., do not necessarily import a statute; the rules of the common law are laws. The substance of the matter should be held to illumine the language, instead of an ambiguous phrase being permitted to override essentials. Further than that, this phrase certainly will be construed so as to make the statute uniform in its operation and valid, if that be possible; and that reason in itself would suffice to induce an interpretation of the phrase "organized under the laws," etc., as inclusive of a joint stock company formed under the common law, if that interpretation be necessary to the constitutionality of the statute. However, if limitation of the statutory language to statutory companies be unavoidable, still complete uniformity may be maintained in the application of the law; because then the phrase "organized under the laws," etc., must be taken to mean companies *really* organized under a statute, in the sense of deriving from the statute some quality or incident which cannot be gotten under the common law; and uniformity therefore will remain, though the operation of the tax may be unfortunately restricted. There is no forcing of the language in making it mean, if necessary, a joint stock company deriving from a statute one or more characteristics which the common law would not give it; because a company which takes from a statute no more than it can get from the common law is not organized under the statute, in any real sense.

The statute in that case is merely declaratory of the common law.

2. Reverting to the differences which exist between the conditions and characteristics of business done by a corporation or joint stock company and the conditions and characteristics of kindred business done by individuals or a partnership—What do the decisions of this court show concerning their sufficiency as a basis for different taxation? Citation of all tax cases in which any question of uniformity has been made, whether under the original Constitution or under the Fourteenth Amendment, will be unnecessary; for the following specially pertinent cases, arranged in four groups, surely are enough:

(1) An excise is least amenable, of all taxes, to to the rule of uniformity; and in the enactment of excises the greatest freedom of classification has been immemorially exercised both by Congress and by other legislatures. *Knowlton v. Moore*, *supra*, again covers the ground, as follows:

But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned.

Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress (pp. 88-89).

And it was said in *Cook v. Marshall County*, 196 U. S. 261:

From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers,

wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned (p. 275).

(2) Uniformity has been found in such Federal excises as these:

A tax on inheritances, though legacies and distributive shares not over \$10,000 were exempted, and though the rate of the tax varied with the degree of kinship and with the amount of the legacy or distributive share; with the result, as already said, that the rate of tax was sometimes more than twenty times as high as in other cases (*Knowlton v. Moore*, 18 U. S. 41; *Murdock v. Ward*, 178 U. S. 139).

A tax on the manufacture of distilled liquors, though required to be computed on as much as 80 per cent. of the capacity of the distillery, notwithstanding actual manufacture of a smaller amount (*United States v. Singer*, 15 Wall. 111).

A tax on manufactured tobacco, though it had previously paid one Federal excise (*Patton v. Brady*, 4 U. S. 608).

A tax on sales of shares of corporate stock, though was not imposed on sales of other kinds of property (*Thomas v. United States*, 192 U. S. 363).

A tax on the manufacture of filled cheese, though in the particular instance the filled cheese was exported and though the statute taxing the manufac-

ture of tobacco (Rev. Stat., sec. 3385) expressly relieved exported tobacco and snuff from the manufacturing tax (*Cornell v. Coyne*, 192 U. S. 418). In this case it was said:

Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter (p. 432).

A tax on sales of "any products or merchandise at any exchange or board of trade or other similar place," though no like tax was put on sales of the same products or merchandise at places not offering the special facilities of an exchange or board of trade (*Nicol v. Ames*, 173 U. S. 508). This case is quite indistinguishable from the present.

Without repetition here of the numerous cases relating to Federal excises, cited in the First Point of this brief, it is enough to say that they will generally be found pertinent on the question of uniformity, through what was decided if not through what was said.

(3) *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, while not involving a Federal excise, needs repetition in this connection. If a foreign company, whether it be a corporation or a joint stock company, can be subjected by a state (as was there held) to a tax upon its business within the state in an amount

different from the tax put by the state upon domestic companies doing like business in the state, it must be equally true that the business of a corporation or joint stock company can be taxed by Congress though the kindred business of individuals and partnerships is not taxed.

(4) We now come to cases under the Fourteenth Amendment, which this court has declared (as already shown) to afford a measure at least of what Congress may do, because there is no greater restraint upon the taxing discretion of Congress than the Fourteenth Amendment imposes upon the state legislature.

The following are a few of the many cases that could be cited:

*Beers v. Glynn*, 211 U. S. 477; holding valid a tax put by New York on the inheritance of personalty in case the decedent also owned realty in the state, though the tax was not imposed if the decedent had no realty as well as the taxed personalty in the state.

*Hatch v. Reardon*, 204 U. S. 152; upholding a tax by New York on sales of corporate stock, though no like tax was put upon sales of other kinds of personal property or even upon sales of bonds of the same or other corporations. It was there said:

In the first place, it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expressions of the Amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import (p. 158).



*Armour Packing Company v. Lacy*, 200 U. S. 226; supporting a state tax on the business of a meat-packing house, though no tax was put on the business of butchers or of those selling the products of the meat-packing house or upon the business of packing other articles of food than meat.

*Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1; sustaining a tax on a surface street railway, though none was imposed upon a sub-surface street railway.

*Savannah, etc., Ry. Co. v. Savannah*, 198 U. S. 392; upholding a tax upon a street railway, though none was imposed on an ordinary steam railway doing "some of the same kind of work" in the same place. (The quoted language is from page 47 of 199 U. S.)

*Cook v. Marshall County*, 196 U. S. 261; sustaining a tax on retail dealers in cigarettes, though none was put on wholesale dealers in cigarettes.

*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; upholding a license tax upon persons and corporations doing the business of refining sugar and molasses, though no such tax was put on "planters and farmers grinding and refining their own sugar and molasses."

*Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; sustaining an inheritance tax of Illinois, though the rate of tax rose in swift progression with the amount of the legacy and the higher rate was applied to every dollar of the larger legacy.

*Pacific Express Co. v. Seibert*, 142 U. S. 339; sustaining a tax on express companies carrying "on contracts for hire with railroad or steamboat com-

panies" (p. 353), though no tax was put upon express companies carrying by their own means of transportation.

*Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232; upholding a tax upon moneyed securities *issued by corporations* at the rate of three mills on the dollar of their nominal or par value, though the rate of tax put upon the like moneyed securities issued by others than corporations was three mills on the dollar of their actual value. This was a case, therefore, of peculiar taxation of corporate securities.

The relation of the Fourteenth Amendment to state taxation was described by Mr. Justice Bradley in language often quoted and never disregarded:

But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not

tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution (p. 237).

We may add, though it is not a tax case, *Otis v. Parker*, 187 U. S. 606, in which the Constitution of California was held valid in its prohibition of "contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day," though the sale of other property on margin or for future delivery was not forbidden.

It will not be denied that Congress may put an excise upon any distinct kind of business and leave all others untaxed (*Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; *McCray v. United States*, 195 U. S. 27); and which of the multitudinous kinds of business shall be taxed it is for Congress alone to say. Its selection of the particular business which shall be the subject of a tax is final beyond cavil, if it be a distinct business, though the actual selection do not rest upon any consideration of the relative utility or profitableness of the business which Congress taxes and the other kinds of business which it does not tax, and even though the taxed business is not conducted under exceptional and advantageous rules of law. How much more may Congress select for taxation business which

*is done under special and exceptionally advantageous legal and practical conditions, as is true of all business done under the special organization of a corporation or joint stock company, and with the advantage of the many special legal rules which give enlarged and prolonged opportunity to that business !*

#### **EIGHTH.**

**None of the special rules prescribed by the taxing statute concerning exemptions or concerning application or computation of the tax produces any lack of necessary uniformity.**

1. It is said that the limitation of the tax to "net income over and above \$5,000" creates an unconstitutional exemption. Both reason and authority supply an answer. The \$5,000 exemption creates what may be called a "margin of safety." Exemptions from taxation of a limited amount of individual property are well nigh universal; and they rest, doubtless, upon the just and necessary policy of leaving a living opportunity unburdened by government. The same policy supports the \$5,000 exemption in this statute. It is especially necessary in the case of a tax measured by net income, because the computation of net income from an extensive and complicated business is always a somewhat uncertain process, both in determination of the factors of profit and expense and in ascertainment (often estimation) of the amount of those factors. Unless some margin of safety against overcalculation of profits is left by the law, it may well often happen that the appearance of profit will be actually erroneous. Beyond

that, it is just and wise to encourage the initiation of new enterprises by giving them special consideration under the law so long as their business remains uncertain and only slightly remunerative. Indeed, the present objection might as well be urged against a tax dependent upon net income at all, instead of being proportioned to gross income. The whole idea of a tax measured by net income is to save a business from public burden unless and until it can surely and safely bear that burden; and such sure and safe ability to pay the tax is guarded in no unreasonable way by allowance of the \$5,000 margin in computation of the company's profits.

It is also noticeable and important that every company is given the privilege of the same \$5,000 deduction. A company having net income of \$10,000 pays only on \$5,000, and a company with net income of \$100,000 pays only on \$95,000. All companies, therefore, are given the benefit of the same corrective factor.

Authority forecloses the matter. In *Spreckels Sugar Refining Company v. McClain*, *supra*, the tax was not imposed by the statute unless the gross annual receipts of the business exceeded \$250,000; and yet the statute was held valid. In *Knowlton v. Moore*, *supra*, the inheritance tax was not applied unless the legacy or distributive share had a value of more than \$10,000. The quotation already made from *Bell's Gap Railroad Co. v. Pennsylvania*, *supra*, declares the entire legitimacy of reasonable exemptions, and the practice of both Congress and the

state legislatures at all times has accorded them. The act of Congress allowing taxation of shares of national banks like other moneyed capital is held to take no account of reasonable exemptions of such other moneyed capital.

*Mercantile Bank v. New York*, 121 U. S. 138.

2. Complaint has been made that "labor, agricultural or horticultural organizations" are not subjected to the tax. These associations, however, seem hardly to be organized for profit. Pecuniary gain is certainly not their direct or main object. At any rate, if it were necessary, the statute could well be construed as not exempting such associations if their primary purpose is business profit. Such construction, however, is far from necessary. The undisputed power of Congress to select the kinds of business which it will tax covers this exception. It is covered also by this court's holding that the business of refining sugar and molasses may be taxed though no tax is put upon "planters and farmers grinding and refining their own sugar and molasses."

*American Sugar Refining Co. v. Louisiana*,  
179 U. S. 89.

The decision in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, declaring invalid a statute of Illinois which prohibited combinations and conspiracies in restraint of trade but excepted from its operation combinations and conspiracies concerning "agricultural products and live stock," has no present pertinence. The power of taxation admits differences in

treatment which may sometimes be improper in other fields of legislation. Mr. Justice Harlan, for this court, stated the distinction thus:

The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the

United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates (pp. 562, 563).

In a later case, *Cook v. Marshall County*, 196 U. S. 261, the same comment was made upon the *Connolly* case and also upon *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79—

These cases, however, have but limited application to the laws imposing taxes, where the



right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism (p. 274).

3. Objection is also made that the tax is not laid upon "fraternal beneficiary societies, orders or associations operating under the lodge system and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders and associations and dependents upon such members". The language of the exception furnishes its own justification. It relates to societies which, as they are "operating under the lodge system" and also are "fraternal", have a social and charitable character. This is farther indicated by the use of the word "benefits" in relation to such payments as are made by the society to its members or dependents in case of death, sickness or accident. Such payments do not constitute an insurance business, even of the mutual kind. The protection which is given to members of the society, in ways resembling insurance, is not the sole or primary object of the society; nor is the procurement of such protection the sole or primary motive of those who enter such a society. The protective benefits are a merely incidental and subordinate feature of the society's work; and, in consequence of the fraternal and charitable character of the society, even such pecuniary benefits are based upon a different principle and determined by other standards and regulated by different rules than even mutual insurance. Examples of such societies, which will be recognized at once as fundamentally social

and charitable, though their charitable operations include something like insurance, are the Knights of Pythias, Knights of Labor, certain Masonic orders, the Red Men of America and the Woodmen of the World. It is almost humorous to urge that such organizations must be considered insurance companies having a purely or chiefly pecuniary function like the New York Life Insurance Company, The Equitable Assurance Society, The Prudential Insurance Company, the New York Mutual Life Insurance Company, the Northwestern Mutual Life Insurance Company, and possibly one or two others which together form the small group of great American mutual insurance companies whose financial power and operations are not surpassed in the entire business world.

Associations of the stated fraternal character are commonly excepted from the general insurance laws of the states.

*Marshall v. Grand Lodge A. O. U. W.*, 66 Pacific Rep. 25, 27.

*Fawcett v. Iron Hall*, 64 Conn. 170, 190.

*Westerman v. Supreme Lodge K. of P.*, 196 Mo. 670; 707, 708; 721, 722.

Such organizations have been held to be exempt from taxation under laws giving exemptions to charitable organizations.

*Mayor v. Solomon's Lodge, etc.*, 53 Ga. 93.

In *City of Petersburg v. Petersburg Mechanics Association*, 78 Va. 431, it was held that the Consti-

tution of Virginia, which allowed the legislature to exempt property from taxation if it were used exclusively for benevolent, charitable, educational or religious purposes, did not forbid the exemption from taxation of such associations as are now being considered; and the court said:

The objects of the association, which was incorporated by the legislature in 1826, are set forth in its constitution and by-laws, and in the preamble thereto, which declares that in instituting a society of mechanics, charity should be the principal but not the only object. Its revenues, as the testimony shows, are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances. These are charitable purposes, and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal. *City of Indianapolis v. The Grand Master, &c.*, 25 Ind., 518 (p. 436).

4. Fault is found also with the exemption of "domestic building and loan associations organized exclusively for the mutual benefit of their members." These associations do not seek gain from the world at large. The exemption extends only to *exclusively* "mutual" associations. Their object, as in the case of "fraternal beneficiary" associations, is to give the benefit of the associate activities to their members as cheaply as possible, rather than to sell their

services to the community at large at as high a price as possible. There are perhaps some building and loan associations which are not exclusively mutual; but, if that be so, the exemption does not reach them. The statute is phrased with exact care to exempt only purely mutual companies.

In *Mercantile National Bank of Cleveland v. Hubbard*, 98 Fed. 465, Judge Taft considered the question whether certain exemptions of building and loan association from state taxation constituted a discrimination against national banks within Revised Statutes section 5219. He said:

It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law (p. 471).

A similar ruling was made by this court in reference to the exemption of deposits in savings banks, in *National Bank of Wellington v. Chapman*, 173 U. S. 205, where it was said:

The result seems to be that the term "moneyed capital," as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute (p. 214).

5. The statute also exempts corporations or associations "organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual". As yet no fault seems to have been found with this.

6. The measurement of the tax by net income of the corporation or joint stock company "received by it from all sources" during the year is said to destroy the requisite uniformity. The answers are several:

(a) It has already been shown that all of the property of a corporation or joint stock company must and does, both in a legal view and in the practical effect which it has upon the business of the corporation or joint stock company, constitute a business

asset. That being so, the measurement of the tax on business by the company's income from all its assets, as well as all its transactions, is essential to real uniformity, or at least highly promotes that uniformity. If one company, by reason of its having larger capital or surplus assets than another, derives a business advantage through its possession of such larger assets, in the ways of larger public confidence in its reliability and stability, greater public patronage and consequent enlargement of the volume of its business, higher credit, with the results of cheaper borrowing and better prices on its necessary materials, and higher profits in consequence of all the foregoing and other influences, then surely such assets form a part of its business plant or equipment and the company's income derived directly or indirectly from such assets is part of its business income, and that income, as much as any other income of the company, may and should be used in measurement of the profitability and value of the business to those embarked in it.

(b) Even if assets of the company be not directly or immediately applied at all times in the general activities of the business, those assets afford opportunity or capacity for business. As already said, they are held for the needs and purposes of the business; and can not be held for any other use. Considering the assets of the company therefore merely as creating an opportunity or measuring a capacity of the company in business, the amount of tax on the business may be properly made to depend

on the existence and extent of such opportunity and capacity. This was directly involved in *United States v. Singer*, 15 Wall. 111.

As will be recalled, a Federal excise upon the liquor business was there held to be properly fixed by the statute at a minimum amount corresponding with 80 per cent. of the total capacity of the plant, though the actual output of the plant was less. It is worth noticing, too, that this court found in the statute involved in the *Singer* case a purpose of counteracting fraudulent methods or returns, saying—

The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within which fraud can be practiced to twenty per cent. of the capacity of the distillery. In view of the enormous frauds previously practiced upon the government in rendering accounts, this system can not be justly charged with unnecessary harshness. Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration (p. 120).

A similar purpose may be ascribed to the present taxing act, for there will be much room for mistaken if not fraudulent separation of the company's income

into business income and property income if such a distinction is recognized. It may be said, also, of the present statute, as this court said of the liquor excise, that companies which continue to hold substantial amounts of property without either giving them activity in the business or distributing them to the business proprietors are "not entitled to much consideration."

Furthermore, what but the capacity of the business measured the excise tax involved, for example, in *Society for Savings v. Coite*, 6 Wall. 594, and *Provident Institution v. Massachusetts*, 6 Wall. 611? That excise was measured by the amount of the bank's deposits whether those deposits were made active in the bank's business or not. The tax, therefore, was proportioned, not to all, but to a part of the company's usable assets, because they enlarged the character and capacity of the bank. The same is true, and equally plain, of the excise involved in *Hamilton Co. v. Massachusetts*, 6 Wall. 632; which, it will be remembered, was measured by the excess of the corporation's capital stock above the value of its real estate and machinery. The value thus measuring the tax on the business created and represented the corporate capacity for business; and no difference was made in the tax in consequence of a possibility that part of the capital, though available and retained for business uses, might at a particular time chance not to be actively employed.

Nor will it do to say that the excises involved in these cases in 6 Wallace were imposed by the state



which chartered the company and therefore could be put at any amount or measured by any test, however unreasonable; for the constitution of Massachusetts provided at the time that excises must be reasonable. It will be found quoted in *President, Directors and Company of Portland Bank v. Apthorp*, 12 Mass. 252 on p. 254. See also *Connecticut Mutual Life Insurance Co. v. Commonwealth*, 133 Mass. 161, where it was held that a franchise tax in Massachusetts could not be sustained as a property tax, but must be treated as an excise, because of its not conforming to the constitutional requirements concerning property taxes.

(c) The business tax upon corporations involved in *Home Insurance Co. v. New York State*, 134 U. S. 594, was measured by the entire capital stock of the company; without any reference to the question whether that capital was passive or active in the business at a particular time.

(d) While such result is believed to be altogether unnecessary and though it would go far to complicate and also to impair this statute, yet it is entirely possible to construe the words "net income received from all sources" as relating only to income derived from property actively employed in the current operations of the business. That construction can be gathered not only from the rule that Congress must be taken to have intended what is constitutional, but also from the express statement of the statute that the tax is laid on companies "organized

for profit" and is laid specifically "with respect to the carrying on or doing business."

7. Another objection is that in computing net income no deduction of interest payments can be made, except in case of interest paid by banks and trust companies on deposits, beyond such interest as is "actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock" of the corporation or joint stock company. But the reason for this limitation on the interest deduction is obvious and strong. Without the limitation, corporations and joint stock companies by issuing bonds for all or most of their capital—either with or without an accompanying issue of stock—could distribute the business profits, however large, in the form of interest payments; and the tax in that way could be entirely or largely avoided. Therefore, no more interest is allowed to be deducted than is paid upon the amount of indebtedness limited by the paid-up capital stock. It was necessary that the stock which fixes the amount of indebtedness whose interest is deductible be required by the statute to be paid-up, because otherwise stock could and would be issued for the mere purpose of enlarging the amount of indebtedness measuring the privilege of interest deduction. As the statute stands, it avoids the inducement to the issue of watered stock which would arise if interest could be deducted when paid upon indebtedness equal in amount to actual stock,

though not paid-up; and it also prevents defeat of the tax through unrestricted creation of debt.

The limit put upon interest deductions is therefore of fundamental practical importance. Without it the entire efficiency of the statute could easily be destroyed. Plans and methods of taxation have to be based upon, and framed in obedience to, practical considerations which will assure the effective operation of the taxing law. So this court has frequently stated. In *District of Columbia v. Brooke*, 214 U. S. 138, this was said concerning taxation:

A wide range of discretion, therefore, is necessary in legislation *to make it practical*, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. . . . We said in *St. John v. New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but *the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose* (p. 150).

In *Hatch v. Reardon*, 204 U. S. 152, it was said of another tax:

The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage (p. 159).

In *Railroad Co. v. Collector*, 100 U. S. 595, it was said:

How are these "earnings, profits, incomes, or gains" to be most certainly ascertained?

In every well-conducted corporation of this character these profits were disposed of in one of the four methods; namely, distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hands. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, *and as less liable to evasion than any other*, the tax is imposed upon all of them (p. 598).

Finally, it is not to be forgotten that no real injustice is involved in the limitation of the interest deduction, because Congress might have measured the excise by gross income. *A fortiori*, for the purpose of measuring the amount of an excise on business, Congress may prescribe general rules as to what shall be deemed net income.

8. The allowance to banks and trust companies of the privilege of deducting all their payments of interest on deposits is for the plain reason that such interest represents a current expense of the business of the bank or trust company, whose very occupation is borrowing and lending money. The deposits are not, in a true sense, either capital or surplus of the bank. The depositors are a different class from the proprietors of the business. The evasions of the law against which the general clause concerning deduction of interest is designed to guard are not threatened in connection with bank deposits.

9. Perhaps complaint will be made that a company which owns stock of another company whose business is itself taxed is allowed to exclude from the computation of its own net income such dividends as it receives upon that stock. This privilege, however, is extended to all companies alike, if they are in the situation to which the privilege attaches; and the deduction is allowed because of equitable considerations which Congress had a right to recognize. There is much similarity between this provision and a deduction considered in *Metropolitan Street Railway Co. v. New York*, 199 U. S. 1. The statute of New York imposing a franchise tax provided "for the deduction of *annual* payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises *lump sums or annual amounts less than the new tax*" were asserted to suffer discrimination (p. 46). This court said of that claim:

With respect to the second [i. e., the stated claim], it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the government. Further, this whole matter of allow-

ing a reduction on account of that which is spoken of as "in the nature of a tax" is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that upon equitable considerations the state has consented that a certain reduction shall, in some cases be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a state from granting exemptions from taxation (pp. 46-47).

Reference may also be made again to *Hatch v. Reardon*, *supra*, where the tax on transfer of shares of stock was measured by the nominal or par value of the shares. Of the two stock-sale transactions considered in that case this court said that, "one of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars" (p. 159). Nevertheless, the fact that the general rule fixed by the statute, and available to all in like situation, wrought an actual inequality in its application to different transactions was held to be unimportant.

10. Another claim of appellants is that this tax on the business of corporations and joint stock companies will operate with necessary inequality because the special privileges and advantages which those companies have under the laws of the several states are different, and therefore the amount of the tax ought to vary with the extent of the privileges and

advantages. This argument would lead to the conclusion that a different Federal excise ought to be imposed in different states, and also to the conclusion that the Federal excise ought to alter with the shifts of state legislation from time to time. Such an idea is utterly impractical. Beyond that, it has no basis in theory. Congress or any other legislature may put the same tax on different kinds of business, even though it may not put different taxes on the same kind of business. If Congress may select a single kind of business as a subject of taxation, it may equally make several kinds of business the subject of a tax. What would be valid if *any* one of the several kinds of business selected for taxation were taxed does not become invalid because they are all taxed.

Like argument was made in *Knowlton v. Moore*, so often cited and quoted, and was answered thus:

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may

obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States (178 U. S., on pages 107-108.)

#### NINTH.

**The company required to pay the tax is not subjected to any unreasonable search or seizure, or improperly required to incriminate itself, by any of the administrative provisions of the statute.**

#### I.

It is claimed that the provision requiring the tax returns to be kept as public records and open to inspection as such is unreasonable, because it enables competitors of the tax-paying companies who are not required to make returns to obtain information concerning the tax-paying companies' business and therefore amounts to an unreasonable search or seizure. As to this—

1. The right to require the returns themselves is not and can not be disputed. It is a necessary incident of the right to impose the tax. Consequently the objection is and must be confined entirely to the publicity feature.



2. Even if the requirement of publicity were obnoxious to the Constitution, that would be no reason for holding the tax invalid or for enjoining the companies from making the returns. Full relief could be had by preventing the returns from being made public. The validity of the publicity feature is not properly an issue in these cases.

3. The publicity feature, however, is *not unreasonable*, because—

(a) Congress has the right to adopt such measures as it deems essential to insure true returns. The tendency to avoid taxes by making false returns is indisputable, and it cannot be better met than by subjecting the returns to the sharp scrutiny of well-informed competitors who are interested in seeing that the reporting companies pay their full taxes. The principle underlying the provision is identical with that which has prompted many states to make general publication of personal property returns. Some of them (Illinois, for example) even go so far as to distribute to all tax-payers in each precinct lists showing the amounts returned by each person for taxation. Nor is it true, as claimed in one of the briefs, that this cannot be the purpose of the provision, merely because publicity is not given to the returns until after assessment has been made; for the assessment may be corrected at any time under Paragraph Fourth of the law and it would be idle to publish the returns until the Commissioner of Internal Revenue had done what he could to verify them

Besides, in this respect the provision is consistent with the general practice in other cases.

(b) The returns will not disclose materially different facts than are published already by most corporations in their annual reports. It may be that some corporations do not give out their annual reports to the public generally, but the rule is otherwise; and, in any event, it can hardly be deemed so unreasonable as to violate the Constitution that what most companies already do is expected of all.

(c) Like reports have for years been required from various kinds of business enterprises by the states under their police powers and by the Government under its power to regulate commerce. Witness the provisions for reports from banks, insurance companies, railroads, pawn-brokers, and others. Such reports are always made at least public records and are frequently published in the newspapers or otherwise. Why should that which is proper when done pursuant to the police power or the power to regulate commerce become improper when done under the taxing power? The necessity for it is no greater in the one case than in the other.

4. Finally, *neither the making nor the publication of the returns can in any possible view be a search or seizure*, reasonable or unreasonable. Search and seizure are both *physical* intrusions, upon the person or his house, papers or effects. It was said in *Hale v. Henkel*, 201 U. S. 43, on page 76, that "a search ordinarily implies a quest by an officer of the law,

and a seizure contemplates a forcible dispossession of the owner." An exception to this rule is sometimes supposed to have been recognized in *Boyd v. United States*, 116 U. S. 616, but the exception is not real. In that case a compulsory production of books or papers, for the direct and sole purpose of incriminating the person producing them, was held to be an unreasonable search and seizure; but this production of books and papers for which the unconstitutional enactment called was itself a physical act and involved a physical invasion. The *place of search* was the court room, but otherwise it was precisely the same as if the person had been seized on the street or in his house and his papers had there been taken from him and examined. Neither the search nor the seizure was the less real because it was enforced by court process. But a return for taxation is merely an enforced statement of the reporting person's *knowledge* and involves no physical invasion of his person, house, papers or effects. He suffers no inconvenience. His house is not entered. His books and papers all remain in his possession and no penalty is attached as in the *Boyd* case for his failure to produce them. Their production is not even commanded or desired. Every element of a search or seizure is therefore lacking. And since the return itself is not obtained by search or seizure it follows necessarily that giving publicity to it cannot amount to a search or seizure.

## II.

It is also claimed that the provision authorizing the Commissioner of Internal Revenue under prescribed circumstances to make inspection of the books and papers of companies subject to the tax, for the purpose of correcting any return already made or of making a return where none has been made, violates the Constitutional guaranty against unreasonable searches and seizures. As to such claim—

1. It is not properly an issue in any case now before the court; for in none of those cases does it appear that the Commissioner of Internal Revenue will have occasion to avail himself of his right to to make the inspection—which is only authorized when *evidence* is produced which satisfies the Commissioner that a particular return is incorrect, or when a collector reports that some corporation, joint stock company or association or insurance company *has failed to make any return* at all. The rule is elementary that courts will not consider a possible constitutional objection to a law until absolute necessity for such consideration arises.

2. But the right to make the stated inspection is undoubted. It is a necessary incident of the right to impose the tax, for without the power to ascertain the income of the taxed company the right to tax is valueless. On this principle the Government's right to search for goods concealed in fraud of the revenue laws and to supervise the manufacture or

custody of excisable articles has never been doubted (*Boyd v. United States, supra*). Without the right to ascertain income for itself, by all appropriate means, how is the tax to be collected if some company refuses to make any return?

3. Nor does the right of inspection fail because the result of its exercise may be to show the falsity of some return and consequent liability to the punishment imposed for making false returns. The *Boyd* case, *supra*, is supposed to, but does not, announce a contrary doctrine. It only held (1) that a search can not lawfully be made *for the sole purpose of obtaining incriminating evidence* and (2) that an order requiring production of books and papers *for a like purpose* amounted to a search. It did not hold that a search justified on other grounds became unreasonable or unlawful because it might result in incriminating the person against whom it was directed. On the contrary, an intent to establish such a rule was in terms negatived and the decision was based entirely on the ground that the sole purpose of the search was to obtain incriminating evidence; the right to make it not being claimed on any other ground. And, accordingly, neither before nor since the *Boyd* judgment has the right to search for stolen goods, or counterfeit coins, or gaming implements, or lottery tickets, or concealed dutiable goods ever been doubted, though in each case the result of the search might be incrimination of the person against whom it was directed.

4. Nor can the fact that the inspection of the books and papers may inform the government officers about

private or confidential business facts which the tax paying company does not desire to reveal affect its legality or reasonableness. It often occurs that in the prosecution of a lawful inquiry or search information of the most private character or even evidence sufficient to show criminal liability is obtained; but the search or inquiry is not unreasonable because it may have such consequence. Thus in the case of *In re Chapman*, 166 U. S. 661, this court held that the guaranty against unreasonable searches and seizures did not protect a witness from disclosure of business transactions between himself and certain Senators in the course of an investigation by a committee of the Senate, lawfully prosecuted and such in scope that the information called for was germane to its purpose. And in *Adams v. New York*, 192 U. S. 585, it was held that certain papers obtained in the course of a search for lottery tickets could be used in evidence against the person searched although such papers were not of a kind for which a search was authorized. The true rule is that the search must be warranted by some right, private or public, such as the right of the owner to recover stolen goods or the right of the Government to seize contraband articles or to assess taxes; but, when so authorized, the search may be conducted to the farthest necessary limit without regard to indirect consequences.

5. The case of *Hale v. Henkel*, (201, U. S. 43, 76-77) does not affect the question. Although it was there held that a *subpœna duces tecum* violated the rule against unreasonable searches and seizures, the de-

cision was based wholly on the ground that the books and papers called for were so numerous that response to the *subpœna* would paralyze the subpœnaed company's business pending the inquiry. Such objection cannot be made to mere inspection of books and papers remaining in the undisturbed possession of their owner, without substantial interference with their continuous use. Indeed in *Hale v. Henkel* the court expressly disclaimed any intention to establish a rule which would interfere with such an inspection of books and papers made pursuant to proper authority. (See p. 77).

6. Lastly, it cannot be contended that the inspection amounts to an unreasonable search because proper safeguards against abuse of the right to make it are omitted. On the contrary the right to make the inspection is limited to two contingencies: (1) "Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the Commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is *incorrect*," and (2) "Whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, *has failed to make a return as required by law*." Thus wanton, whimsical, or unwarranted searches are guarded against by requiring initial proceedings, substantially like those required for obtaining search warrants.

## III.

Finally, it is claimed that the authority vested in the Commissioner of Internal Revenue to examine officers and employes of the tax-paying companies as witnesses and to compel production of books and papers violates the constitutional guarantee of immunity from self-incrimination. The answers to this assertion are:

1. Like the claims discussed in subdivisions I and II, it is not in this case and should not be considered. This present litigation relates only to the obligation of any company *to pay the tax and itself to make a return.*

2. The right to examine witnesses and to compel production of books and papers for the purpose of verifying tax returns is unquestionable. Argument in support of that proposition is unnecessary. The only question is whether the statute compels a witness to give testimony or produce books or papers which will incriminate him.

3. Such is not the case. By no possible construction can the statute be so distorted. Like any other statute giving the right to take testimony in general terms it is subject to the qualification that the testimony may properly be obtained from the witness. It is altogether unlike the statute considered in the *Boyd* case, *supra*. That statute did in fact attempt to compel self-incrimination; for, after authorizing orders requiring production of books and papers, it provided that in case of a refusal or failure to do so



the facts which were sought to be proved by the books or papers *should be taken as confessed*, and the whole proceeding related to cases wherein the Government was attempting to enforce penalties for violations of the revenue laws.

4. Accordingly there can be no objection to the *law itself* on the present ground; but such objection can only go to particular attempts to obtain evidence under the law. Not only so but the objection can only arise when the witness claims the privilege against self-incrimination for his own benefit. The privilege is a personal one, and cannot be claimed even by an agent in behalf of his principal or by an officer in behalf of a corporation. (*Hale v. Henkel, supra*, pp. 69-70, 74, *et seq.*). If in any case an improper attempt be made to compel a witness to incriminate himself, the courts will be at hand to protect him.

#### TENTH.

The tax may properly be collected in 1910, though it is measured by the net income of the tax-paying company during the calendar year 1909, of which seven months had already passed when, on August 5, 1909, the taxing statute was enacted.

Three considerations show this:

1. The tax is not laid upon, but is only measured by, income. However measured, it remains a tax for the year 1910 in which it is payable. Suppose it had been measured by the undivided profits on hand on January 1, 1910, would anyone contend that it was retroactive because those profits might be the accumulations of years? Indeed, this court has itself sug-

gested that income for one year might properly be adopted as the measure for *all* future years. (*Maine v. Grand Trunk Ry.*, 142 U. S. 217, 229.)

2. Even an excise laid in terms on income may be levied after part of the year during which the taxed income is received has expired. In *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, this court had before it the question whether or not an act passed July 14, 1870, and providing that a prior act laying a tax on incomes *until* 1870 should be "*construed*" as imposing a tax until August 1, 1870, could be treated as itself imposing the tax for the period from January 1 to August 1, 1870. In holding that it could be so treated, the court said:

The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

Although the judgment in this case was by a divided court (four judges placing their decision on the stated ground alone, two judges concurring in the *opinion* on that ground though thinking there was "a still more satisfactory ground," and three judges dissenting), yet the dissent did not reach the proposition established by the quoted language—which was but a preliminary step, though a necessary one, in reaching the conclusion that Congress *intended* to im-

pose a new tax by the act of 1870—for on page 341, in the dissenting opinion, it was said:

Of course, I am not to be understood as maintaining that when the declaratory act was passed, Congress had no power to impose a tax upon any income that had been received before that time.

And the doctrine of the *Stockdale* case, *supra*, both on the point under consideration when the quoted language was used and on the point treated in the concurring opinion, was explicitly confirmed after full consideration in the case of *Railroad Co. v. Rose*, 95 U. S. 78, 80. The authority of the *Stockdale* case is therefore decisive. Beyond that, it was pointed out by way of argument in support of the conclusion in the *Stockdale* case that “the joint resolution of July 4, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it;” and, although this language was used merely by way of argument, its soundness has since been sustained in the case of *Patton v. Brady*, 184 U. S. 608. In that case, the validity of the provisions of the war revenue act of 1898, which required the payment of new taxes *in addition to those which had already been paid* on all tobacco held for sale, was attacked on the ground that, one excise having already been paid upon the tobacco there involved, another could not constitutionally be imposed upon it. But the court, in an elaborate opinion, unanimously held otherwise.

3. Finally, "unless the Constitution prohibits retrospective legislation, the basis of an assessment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be assessed thereafter" (Cooley on Taxation, 3d ed., p. 492); and the Federal Constitution does not prohibit retrospective taxation.

*Locke v. New Orleans*, 4 Wall. 172.

#### ELEVENTH.

**If in any part or application this taxing statute is unconstitutional, it should be sustained nevertheless in all its other parts and applications.**

Extended discussion of this proposition is unnecessary. The general rule on which it is founded is well stated in Cooley's Constitutional Limitations (7th ed.), as follows:

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. \* \* \* Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it can not be presumed the legislature would have passed the one without the other (pp. 246-7).

\* \* \* \* \*

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. \* \* \* In any such case the unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others (p. 250).

Instances of the application of the first branch of the rule are found in *Field v. Clark*, 143 U. S. 649, and *Huntington v. Worthen*, 120 U. S. 97; and of the second branch of the rule in the first *Income Tax* case, 157 U. S. 429, and *New York Central R. R. Co v. United States*, 212 U. S. 481, 497. The principle applies with special and peculiar force to tax legislation. In *Field v. Clark* it was said (p. 696):

Unless it be *impossible to avoid it*, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

In *Huntington v. Worthen* it was held that even the invalidity of an exemption did not void the entire act, although the enforcement of the act without giving effect to the exemption resulted in the imposition of the tax on the exempted property, contrary to the declared intention of Congress; and in the second *Income Tax* case, 158 U. S. 601, although the entire act was declared invalid, it was only because the tax attempted to be levied by the unconstitutional part of the law constituted "by far the largest part of the anticipated revenue" under the act; so that, if the remainder of the law had been allowed to stand, "what was intended as a tax on capital would remain in substance a tax on occupations and labor" (pp. 636-7).

In the present case the various objections to particular parts or applications of the law are all embraced in one or another of three classes, viz: (1) Objections to the inclusion of certain species of income in the computation of the net income for the purpose of measuring the amount of the tax. (2) Objections to the application of the law to particular kinds of enterprises. (3) Objections to administrative features of the law.

It is clear that, even if some or all of these objections can be sustained, it does not follow and cannot be supposed that Congress would not have passed the law so far as it is unobjectionable, because—treating the several classes of objections in their order—

1. Only a comparatively small part of the income of companies engaged in business for profit is of a

kind to which the objections reach. To use the language of this court in the *Income Tax* case, "by far the largest part" of the income by which the amount of the tax will be measured is derived from commercial activities, as distinguished from income-producing property held or used in connection with the business, and consequently is not within any of the objections. In all or nearly all kinds of business carried on for profit the important revenue-producing factor is exchange. The merchant exchanges goods; the broker, services; the insurance company, insurance; the carrier, transportation; and the income received through such exchanges is not of a kind reached by the objections. Not only so, but if there be companies whose income is largely or mainly of a kind objected to, their income will form but a small part of the total sum by which the aggregate amount of the Government's revenue under the law will be determined, and it cannot reasonably be supposed that, had Congress known its inability to include such income in measuring the amount of the tax, such knowledge would have deterred it from raising the immensely more important part of the desired revenue by the means adopted. In the first *Income Tax* case the reduction in the total revenue through the invalidity of the tax with respect to income from real estate and state securities was vastly greater than could be the reduction in the present case if all the income objected to were eliminated in computing the tax, and yet this court was unable to conclude that the entire law was invalid for that reason. *A fortiori*

should such conclusion be avoided here. Further than that, the exclusion of all the income objected to in this case could not possibly have the result which compelled the court to declare the entire law void in the second *Income Tax* case—namely, a change in the character of the tax; for the tax in the present case was not intended to be, and is not in fact, a tax on capital, but is solely a tax upon the conduct of business, *and will remain so, whether measured by all or only by some of the kinds of income received by the companies taxed.*

2. From what has already been said, it is equally clear that the unconstitutionality of the tax as to some particular kind of enterprise can not affect its validity as a whole. Not only would the effect of such unconstitutionality upon the total revenue be insignificant, but so also would be its effect in reducing the number of different kinds of business taxed. The law reaches all kinds, and therefore each kind, of business carried on by any corporation or joint stock company, as well as the insurance business. The variety of businesses taxed is therefore unbounded, while the number of different kinds of enterprise which claim immunity from the tax by reason of their character is relatively small. In such circumstances the separableness of the portion of the act applicable to non-taxable enterprises (if there be any such portion) is obvious.

3. The validity of the tax itself can not in any possible view be affected by unconstitutionality of any of the administrative features of the law which



are attacked. All of the objections to such features could be sustained and still sufficient machinery would remain for the collection of the tax, though evasions of it might be made easier.

CONCLUSION.

The decrees of the several Circuit Courts, from which appeals have been taken, should be affirmed in all the cases.

GEORGE W. WICKERSHAM,  
*Attorney-General.*

LLOYD W. BOWERS,  
*Solicitor-General.*

MARCH, 1910.

## APPENDIX.

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or asso-

ciations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other

indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided*, That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allow-

ance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year end-

ing December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint

stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any,

required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in



the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue

under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon informa-

tion obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the

time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

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STELLA P. FLINT, AS GENERAL GUARDIAN of the property of Samuel N. Stone, jr., a minor, appellant, v. STONE TRACY COMPANY ET AL.	}	No. 747.
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Also fourteen other cases ad- vanced for hearing with the preceding case.	}	Nos. 751, 752, 753, 754, 757, 767, 775, 784, 785, 796, 797, 800, 816, and 819.
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## SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

While the point was not urged by any appellant in the oral argument of these cases, it is suggested in some of the bills that the corporation tax amendment, being section 38 of chapter 6 of the acts of the Sixty-first Congress, first session, is unconstitutional because it is a revenue measure and originated in the Senate, in violation of the following provision of section 7 of Article I of the Constitution:

All bills for raising revenue shall originate in the House of Representatives; but the Senate

may propose or concur with amendments as on other bills.

This supplemental brief will merely enumerate the grounds on which this contention is met.

#### ARGUMENT.

The Constitution allows the Senate to "propose or concur with amendments as on other bills;" and this section 38 was a permissible amendment.

The bill introduced in the House and into which section 38 was put was a general bill for the collection of revenue. It dealt chiefly with tariff duties, but not exclusively. Various internal-revenue taxes were proposed in it; and the preponderance of the tariff provisions was solely because of the prominence which such taxes have heretofore had in the fiscal plans of the United States. The amendment adding a corporation tax was germane to such a bill proposing various sources of governmental revenue. What the tariff taxes themselves should be would necessarily depend upon the nature and productiveness of the complementary taxes imposed by the measure. Taxation ought to be, even if sometimes it is not, imposed through a consistent plan which disposes its burden in different ways and on different things. It is therefore proper to introduce into a revenue bill—none the less because it is chiefly a tariff bill—any form of tax which, besides supplementing the tariff duties, will naturally alter the tariff plan itself either in the direction or in the amount of the various duties.

The bill as originally introduced in the House (H. R. 1438; secs. 34-38, 61st Cong., 1st sess., Doc. No. 92, pp. 341-350) contained a plan of inheritance taxation. The corporation tax was in part a substitute for that inheritance tax, which was removed in the Senate. When the Senate took out the inheritance tax, the consequent loss of revenue had to be met in some way, and the corporation tax was one of the ways of meeting it. This exhibits concretely the organic relation between the corporation tax and all other parts of the total revenue plan. Each part of a taxing scheme unavoidably has real relation to all its other parts.

The amendment of this revenue bill by substitution of the corporation tax for other forms of tax in the Senate was in accord with a custom which has prevailed from the very establishment of the Federal Government. Immediately upon the adoption of the Constitution the Senate began to exercise its power of freely amending revenue bills (*Annals of Congress*, 1st session of 1st Congress, 1789, p. 46). The early records show that the Senate at once assumed the right to strike out or to add sections in revenue bills (*Annals of Congress*, 1st session of 3d Congress, 1793-1795, p. 119); and that the exercise of this power sometimes resulted in conference and compromise, of which Bryce speaks in his "*American Commonwealth*," volume 1, pages 99-100 (*Annals of Congress*, 3d session of 1st Congress, 1790-1791, pp. 1764, 1771; *Annals of Congress*, 1st session of 3d Congress, 1793-1795, pp. 104, 105, 119,

683, 697, 700); while at other times the House has accepted the Senate's amendments without controversy (Annals of Congress, 1st session of 1st Congress, 1789, p. 79).

## II.

In a true view of the legislative growth of the general revenue measure forming chapter 6 of the enactments of the first session of the Sixty-first Congress, section 38 did not originate in the Senate.

The general history of the matter is as follows:

(a) H. R. 1438 was passed by the House without a corporation tax and with an inheritance tax and other provisions which disappeared in the Senate.

(b) A form of the corporation tax, importantly different from that finally enacted, was introduced as an amendment in the Senate; and the Senate passed the bill with that and other amendments.

(c) The House refused to concur in the Senate amendments to its bill; and that refusal embraced the corporation tax amendment.

(d) A conference committee was appointed by each House of Congress, and the conferees finally agreed upon the present form of the corporation tax. The important differences between such tax as approved by the conferees of the Senate and House and the form of the tax originally offered in the Senate will appear from House Document No. 92 of the Sixty-first Congress, first session, pages 402-413 and pages 457-461. The latter pages show the form of the corporation tax section both as finally passed by both Houses and as proposed by the conferees.



(e) Section 38 in the new and different form given to it by the conferees was reported to each House by its conferees.

(f) The House passed the section as submitted by its conferees.

(g) After its passage by the House the present section 38 was passed by the Senate.

It results that, as the present section 38 is vitally different from the section originally proposed in the Senate and as the present form of the section originated with the conferees of the House as well as of the Senate, this corporation tax law did originate in the House. It can properly be said to have originated with its submission to the House by the representatives of that body in the conference. Further, the present form of the section passed the House before it was voted on in the Senate; and it may well be said that a bill originates in that House which first passes it.

### III.

Chapter 6 of the acts of the first session of the Sixty-first Congress, containing section 38, is now in the official custody of the Secretary of State; and it bears the usual certificate of the Clerk of the House of Representatives *that the measure originated in that House*; and it is signed by the President of the Senate and Speaker of the House in the usual way; and it bears the signature of the President in approval of the act.

These facts and certificates are indisputable as to the regularity of the bill's introduction and passage.

*Field v. Clark*, 143 U. S. 649.

*Harwood v. Wentworth*, 162 U. S. 547.

*Twin City Bank v. Nebeker*, 167 U. S. 196.

*Millard v. Roberts*, 202 U. S. 429, 438.

These cases do not decide the question, but they put it with repeated force. Thus, in *Field v. Clark*, it was said:

The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them (p. 673).

In *Harwood v. Wentworth* it was directly held that an act of the legislature of the Territory of Arizona, officially attested and approved and committed to the custody of the secretary of the Territory, could not be impeached by the use of recitals or through the omission of recitals in the legislative journals which were not required by the fundamental law of the Territory to be so kept as to show everything done in the legislature while engaged in consideration of the bill resulting in the enactment.

## IV.

Only the House of Representatives itself can protect its right to have revenue bills originate there. This particular provision of the Constitution can not be deemed self-executing, with the result of making a revenue enactment void though it has had the actual assent of both Houses of Congress. When the House of Representatives in fact has agreed to the measure, all objection because of the place of its origination should be deemed waived by the body which has the right to insist on it.

## V.

At any rate, if anybody else than the House of Representatives can insist upon the constitutional provision, that important power is not left to any private individual who may take it upon himself to make the attack. The protection given by the Constitution, through its requirement that the more popular branch of Congress shall originate taxing measures, belongs to the public as a whole and not to particular citizens. It is therefore to be enforced by the proper official representatives of the public. No private citizen has any special or peculiar interest in the matter; for no private citizen is injured by disregard of the constitutional rule in any way that is special or peculiar to him. This is a quite normal application of the familiar general doctrine that individuals can not enforce public rights when their violation causes no private injury of a special kind.

It can not be supposed that the Constitution was designed to put into the hands of any and every individual citizen a privilege of private attack upon legislation which has received the actual and full assent of both Houses of Congress.

LLOYD W. BOWERS,  
*Solicitor-General.*

MARCH, 1910.

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# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OTOMBE TERM, 1900

No. 701409

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WYCKOFF VAN DERHOEF, APPELLANT

THE CONNY ISLAND AND COCKLYN RAILROAD  
COMPANY, RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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FILED SEPTEMBER 24, 1900

(CLERK)



(21.977.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 751.

WYCKOFF VAN DERHOEF, APPELLANT,

v8.

THE CONEY ISLAND AND BROOKLYN RAILROAD  
COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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*Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

*In Equity.*

WYCKOFF VAN DERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, and  
Slaughter W. Huff, William N. Dykman, James H. Hyde,  
George H. Prentiss, William H. McIntyre, Charles T. Young,  
John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy  
Richards, Edwin S. Marston, Allan McCulloh, and Duncan B.  
Cannon, Directors of said Company, Defendants.

To the Judges of the Circuit Court of the United States for the  
Southern District of New York, in the Second Circuit, Sitting in  
Equity:

Your orator, Wyckoff Van Derhoef, a citizen of the State of New  
York and a resident of the Borough of Brooklyn in the City of  
New York in said State, brings this his bill of complaint in be-  
half of himself and all other stockholders of the defendant The  
Coney Island and Brooklyn Railroad Company who are similarly  
situated and who shall be entitled to avail themselves of the benefit  
of this suit against said The Coney Island and Brooklyn Railroad  
Company and Slaughter W. Huff, William N. Dykman, James H.  
Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young,  
John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy  
Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Can-  
non, as Directors thereof; and thereupon your orator complains and  
shows:

2 First. That the defendant The Coney Island and Brooklyn  
Railroad Company is a corporation duly organized in the  
year 1860 under and by virtue of the provisions of an act of the  
Legislature of the State of New York entitled "An Act to Authorize  
the Formation of Railroad Corporations and to Regulate the Same,"  
passed April 2, 1850, and the acts amendatory thereof or supple-  
mentary thereto. Said defendant company was organized for the  
purpose, as stated in its charter, of constructing, maintaining and  
operating a railroad for public use in the conveyance of persons and  
property from a point in and upon Coney Island in the Town of  
Gravesend, County of Kings, State of New York, to a point in the  
City of Brooklyn at or near the Fulton Ferry in said County and  
State. On April 20, 1861, the Legislature of the State of New York  
enacted "An Act to Authorize the Coney Island and Brooklyn Rail-  
road Company to Construct their Road and to Lay Thereon Rails  
of Less Weight than Required by the General Railroad Act and to  
Widen and Reconstruct the Bridge at Coney Island," being Chapter

324 of the Laws of that Year, and thereby the said Legislature located the Railroad of the said defendant from the Fulton Ferry in the City of Brooklyn to a point in and upon Coney Island in the County of Kings, through and over various public streets, roads and avenues in said Act referred to. In 1861 and 1862 the said railroad of the defendant Company was constructed and it ever since has been operated by said defendant. On April 30, 1866, the Legislature of the State of New York enacted "An Act to Extend the Boundaries of Prospect Park in the City of Brooklyn," being Chapter 853 of the Laws of that year, and thereby extended Prospect Park and closed Eleventh Avenue, on which the defendant company's railroad was located, and authorized said defendant company to construct and operate its railroad on Ninth Avenue from Ninth Street to Fifteenth Street. On May 7, 1868, the Legislature of the State of New York enacted "An Act for the Relief of The Coney Island and Brooklyn Railroad Company," being Chapter 675 of the Laws of that year, and thereby authorized the defendant to lay its tracks upon Fifteenth Street from Ninth Avenue to the intersection of Fifteenth Street with the Coney Island road, and to operate its road and run its cars over the same. On April 25, 1872, the Legislature of the State of New York enacted "An Act for the Relief of The Coney Island and Brooklyn Railroad Company," being Chapter 365 of the Laws of that year, and thereby authorized said defendant company to construct and operate its railroad upon Church Street (now Ninth Street) from Smith Street to Hamilton Avenue and thence along Hamilton Avenue to Hamilton Ferry. Said defendant company has also succeeded by purchase, merger or lease to all the rights, privileges, franchises and property formerly belonging to the Prospect Park and Flatbush Railroad Company, incorporated in January 1876 under the General Railroad Act of 1850 of the State of New York, and the Brooklyn City and Newtown Railroad Company, a corporation organized under the same Act. The railroads now owned and operated by said company defendant are as follows: a railroad from the Fulton Ferry, Brooklyn, and from Park Row, Manhattan, to Coney Island, and a branch from the Hamilton Ferry, Brooklyn, connecting with the aforesaid line at Smith Street and Ninth Street; the De Kalb Avenue line, so-called, extending from the Fulton Ferry, Brooklyn, and Park Row, Manhattan, to the corner of Covert and Metropolitan Avenues, in the Borough of Queens, City of New York, and the Franklin Avenue line extending from the Grand Street and Broadway ferries, Brooklyn, and the Manhattan terminus of the Williamsburg Bridge, to Prospect Park at the corner of Melbone Street and Flatbush Avenue. Said railroads, owned and operated by said defendant company as aforesaid, are situated in the State of New York and upon the public streets thereof. Under the laws of the State of New York the said defendant The Coney Island and Brooklyn Railroad Company is authorized by reason of the public nature of its business to exercise the right of eminent domain and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings in the exercise of said right of eminent domain.

The business conducted by said defendant company is solely and exclusively that of owning maintaining and operating the railroads aforesaid, on which passengers are transported for hire. Said defendant is not engaged in the transaction of any business between the State of New York and any foreign country or between the State of New York and any other of the United States or territories thereof.

Second. The capital stock of said defendant The Coney Island and Brooklyn Railroad Company consists of the sum of \$2,983,900.00, divided into shares of the par value of One hundred Dollars each. Said defendant company now has and for several years last past has had a bonded indebtedness of \$3,500,000 as follows:

\$2,000,000 of four per cent bonds issued under the First

Consolidated Mortgage of said The Coney Island and Brooklyn Railroad Company to The Mercantile Trust Company, Trustee, dated May 20, 1898, and \$1,500,000 of four per cent bonds issued under the Consolidated Mortgage of said defendant company to The Mercantile Trust Company, Trustee, dated December 15, 1904. In addition to the aforesaid mortgage bonds the said defendant company has and during the year ending December 31, 1909, had other indebtedness in excess of \$200,000.

Third. Your orator further shows that the net income received by the said defendant The Coney Island and Brooklyn Railroad Company from all sources during the year ending December 31, 1909, as appears from the monthly reports of said company to the Public Service Commission of the State of New York, amounted to a sum in excess of \$205,000 after making all deductions of the character provided for in Section 38 of the Act of Congress approved August 5th, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes."

Fourth. Your orator further shows that by the Laws of the State of New York and the charter of said defendant The Coney Island and Brooklyn Railroad Company, it is among other things provided that the affairs of said Company shall be managed and conducted by a Board of thirteen directors. The defendants Slaughter W. Huff, William H. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, constitute the present Board of Directors of said Company and as such are now managing and conducting all and singular the business and affairs of said Company.

Fifth. Your orator further shows that he became the owner and registered holder of ten shares of the capital stock of said defendant The Coney Island and Brooklyn Railroad Company more than ten years ago and that he has ever since been and still is the registered holder and owner in his own right of said shares, which are of large value. The capital stock of said Company is divided among a large number of different persons who as such stockholders constitute a large body, and this suit is for an object common to all. Your orator therefore brings this suit in his own name and in his own behalf

both as a stockholder in said Company and also as a representative and on behalf of such other stockholders similarly situated and interested as may choose to intervene and become parties thereto.

Sixth. Your orator further shows that, as he is informed and verily believes, the defendant The Coney Island and Brooklyn Railroad Company and a majority of its directors who are managing and conducting its business and affairs as aforesaid, have announced that under and by virtue of the alleged authority of the provisions of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue Equalize Duties and Encourage the Industries of the United States and for other Purposes", they intended voluntarily to make and file with the Collector of Internal Revenue prior to the 1st day of March, 1910, a return or statement in the form prescribed by said Section of said Act, showing in detail the amount of net income of said Company for the year ending

7 December 31, 1909, and voluntarily to pay to the said Collector of Internal Revenue on or before the 30th day of June, 1910, a tax of one per cent upon the entire net income of the said The Coney Island and Brooklyn Railroad Company over and above Five thousand Dollars received by it from all sources during the calendar year ending December 31, 1909, after making the deductions provided for in said section of said Act. Your orator further shows that the tax which the defendant The Coney Island and Brooklyn Railroad Company would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said section of said Act would, as your orator is informed and verily believes, exceed the sum of \$2,000.

Seventh. Your orator avers that the provisions of said Act purporting to levy a special excise tax upon all corporations with respect to the carrying on or doing business by such corporations and measured by a percentage upon their net income are unconstitutional, null and void, in that

(a) The said tax is in effect a tax upon the corporate existence or franchise of corporate capacity of the defendant The Coney Island and Brooklyn Railroad Company, and is therefore a tax upon the exercise by the State of New York of sovereign powers and functions not surrendered to the United States and clearly reserved to said State of New York by the Tenth Amendment to the Constitution of the United States.

(b) The said tax is in effect an interference with a governmental agency or instrumentality of the State of New York.

8 (c) The said tax constitutes in effect an interference with the exercise by the State of New York of a governmental function, to wit: the function of providing means of transit and inter-communication for its citizens and the public.

Eighth. Your orator further avers that the provisions of the aforesaid Act of Congress imposing the said tax are unconstitutional, null and void, in that they are not uniform throughout the United States as required in and by Section 8 of Article I of the Constitution of the United States, and in that the same are arbitrary and unequal in violation of the Constitution and the Fifth Amendment.

thereof, and the fundamental principles of taxation and are in excess of the powers of taxation surrendered to the general government by the States and the people thereof.

And your orator further avers that the said tax is unequal and arbitrary and is not uniform throughout the United States.

(a) Because the tax is measured not by the income derived from the business carried on, but by the income of the owner derived from all sources whatsoever.

(b) Because said tax is imposed upon corporations measured by a percentage upon their net income, whereas no similar tax is imposed upon the income of either individuals or ordinary partnerships although they may be engaged in the same general business.

(c) Because labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations  
9 organized and operated exclusively for the mutual benefit of their members, all of which are corporations, are specifically exempted in and by said act from all liability for the tax imposed thereby.

(d) Because all corporations whose net income for any one calendar year does not exceed five thousand dollars are specifically exempted in and by said Act from the tax imposed thereby.

(e) Because by said Act a larger tax is imposed upon the defendant The Coney Island and Brooklyn Railroad Company by reason of the fact that its indebtedness exceeds the amount of its paid up capital stock than upon other corporations engaged in the same general business whose capital stock exceeds their indebtedness.

Ninth. Your orator further avers that the provisions of said Act prescribing said tax are unconstitutional, null and void in that the corporations subject thereto may, by virtue of the aforesaid arbitrary and unequal exactions of such provisions, be deprived of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Tenth. Your orator further avers that the franchises of the defendant The Coney Island and Brooklyn Railroad Company to construct, maintain and operate its said railroads, including its right to occupy the public streets, are by the laws of the State of New York defined to be real estate, and that substantially the entire income of said Company is derived from the exercise of said franchises; that if the said tax under the aforesaid Act be construed as a tax upon the franchises of the said Company  
10 regarded as property or as a tax upon income, the provisions of the Act imposing said tax are unconstitutional, null and void, because it is a direct tax upon real estate and personal property or the income therefrom, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article I of the Constitution of the United States.

Eleventh. Your orator further avers that the said provisions of said Act imposing said tax are unconstitutional, null and void, in that all corporations thereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable

to a penalty or to forfeit their property in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Twelfth. Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that he has duly requested the defendant The Coney Island and Brooklyn Railroad Company and its directors in writing to omit and refuse to pay and to refrain from paying said tax, and to contest the constitutionality of said Act, and to refrain from voluntarily making the return required by said Act, and to apply to a court of competent jurisdiction to determine said Company's liability under said Act, and that a copy of said request is hereto annexed as Exhibit "A" and made a part of this Bill of Complaint; but that said defendant

The Coney Island and Brooklyn Railroad Company and a majority of its directors, after a meeting of said directors at which the matter and said request were formally laid before them for action, refused and still refuse and intend omitting to comply with your orator's demand, and have resolved and determined and intend to comply with all and singular the provisions of said Section 38 of said Act of Congress, and to make the return therein provided for, and to pay the tax upon the said Company's net income thereby sought to be imposed. A copy of the refusal of said defendant The Coney Island and Brooklyn Railroad Company is annexed as Exhibit "B" to this complaint.

Thirteenth. Your orator further shows that if the defendant The Coney Island and Brooklyn Railroad Company and its directors, as they propose and have declared their intention to do, pay said tax out of the net income of said defendant company, they will thereby diminish the assets of said Company and lessen the value of its stock including the stock held by your orator, and lessen the dividends thereon.

Fourteenth. Your orator further shows that the voluntary compliance by the defendant The Coney Island and Brooklyn Railroad Company and its directors with the provisions of said Act of Congress insofar as it seeks to impose a tax upon said defendant Company will expose said defendant Company to the risk of a multiplicity of suits by and on behalf of its numerous shareholders, and that such numerous suits would work irreparable injury to the business of said defendant company and involve it and its stockholders including your orator in great and irreparable loss.

Fifteenth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds exclusive of interest and costs, the sum or value of Two thousand dollars, and arises under the Constitution and laws of the United States, and that your orator and other stockholders of said defendant company have no adequate remedy at law in the premises; that the contemplated action by the said defendant Company and its directors, the individual defendants, in voluntarily complying with the provisions of said Act of Congress as aforesaid, is contrary to equity and good conscience and will tend to the manifest wrong, injury, and oppression of your orator in the premises.



Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relieviable only in a court of equity, where matters of this nature are properly cognizable and relieviable, your orator prays

1. That it be adjudged and decreed that the provisions of said Section 38 of said Act of Congress, approved August 5th, 1909, purporting to impose a special excise tax upon the defendant The Coney Island and Brooklyn Railroad Company, are unconstitutional, null and void;

2. That the defendants be restrained from voluntarily complying with the provisions of said Act and from making the return or statement required thereby and from paying the tax aforesaid;

3. That your orator may have such other and further or  
13 different relief in the premises as to a court of equity may seem meet.

To the end therefore that said defendants may if they can show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said The Coney Island and Brooklyn Railroad Company under its corporate seal and the said individual defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpoena *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendants The Coney Island and Brooklyn Railroad Company and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, as directors of said The Coney Island and Brooklyn Railroad Company, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answers make to all and singular the premises, and further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of per-

14 petual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed, and your orator as in duty bound will ever pray, &c.

ALEXANDER & GREEN,  
*Solicitors for Complainant,*  
120 Broadway, New York City.

R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Of Counsel.*

15 UNITED STATES OF AMERICA,  
*Eastern District of New York, County of Kings, ss:*

Wyckoff Van Derhoef, the complainant in the foregoing bill named, being duly sworn on his oath says that the matters and things in the said bill set forth in so far as they relate to his own acts and deeds are true and so far as they relate to the acts and deeds of others he believes them to be true.

WYCKOFF VAN DERHOEF.

Sworn and subscribed to before me this 21st day of January 1910.

[SEAL.]

R. DAMM,  
*Notary Public, Kings County, New York.*

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EXHIBIT "A."

To The Coney Island and Brooklyn Railroad Company, and to Messrs. S. W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, J. H. Walbridge, Harold Fitz Gerald, F. R. Ford, Duncan B. Cannon, Directors of said Company.

SIRS: I am a stockholder in The Coney Island and Brooklyn Railroad Company and am informed that the company intends to voluntarily comply with the requirements of Section 38 of the act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," which became a law August 5, 1909, known as the tariff act, and which purports to impose a "special excise" tax upon all corporations in the United States organized for profit and having a capital stock represented by shares, equivalent to 1% upon their annual net earnings, beginning with the year ending December 31, 1909.

I claim that the provisions of said act of Congress in respect to said tax are unconstitutional. As a stockholder of The Coney Island and Brooklyn Railroad Company I hereby protest against any action of the company and its directors in voluntarily complying with the provisions of said act imposing the said tax, and I request that said company and its directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily paying the tax provided for therein, and from voluntarily making returns and statements in its behalf. I further request that said company and its directors shall contest the constitutionality of said act and protect its stockholders and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the railroad company's stockholders.

Very truly yours,  
(Sgd.)

WYCKOFF VAN DERHOEF.

January 18, 1910.



17

## EXHIBIT "B."

Coney Island and Brooklyn Railroad Co.,  
Cor. De Kalb and Franklin Aves.

BROOKLYN, N. Y., *January 19th, 1910.*

Wyckoff Van Derhoef, Esq., Brooklyn, N. Y.

DEAR SIR: Referring to your circular of the 18th instant, addressed to this Company and its Directors, we have to say that the Board of Directors at a meeting held this day considered the matter, and we hand you herewith a certified copy of the resolution which they passed in relation to your request.

Yours truly,

THE CONEY ISLAND & BROOKLYN  
R. R. CO.,

(Sgd.) By DUNCAN B. CANNON, *Secretary.*

*(Enclosure Referred to in the Foregoing Letter.)*

NEW YORK, *January 19th, 1910.*

At a meeting of the Board of Directors of The Coney Island and Brooklyn Railroad Company duly held this day the following resolution was passed:

"Resolved: that the Board of Directors deem it inexpedient to comply with the demand of Mr. Van Derhoef on the ground that the failure to comply with the provisions of Section 38 of the Act of Congress entitled 'An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes', approved August 5, 1909, would subject the Company to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate."

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Board of Directors of The Coney Island and Brooklyn Railroad Company.

(Signed)

[CORPORATE SEAL.]

DUNCAN B. CANNON,

*Secretary.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 22, 1910. John A. Shields, Clerk.

19

*Demurrer.*

In the Circuit Court of the United States, for the Southern District  
of New York.

In Equity.

WYCKOFF VAN DERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and S. W.  
Huff, William N. Dykman, James H. Hyde, George H. Prentiss,  
William H. McIntyre, Charles T. Young, J. H. Walbridge, Harold  
Fitzgerald, F. R. Ford, Guy Richards, Edwin S. Marstow, Allan  
McCulloh, and Duncan B. Cannon, Directors of said Company,  
Defendants.

The Demurrer of the Coney Island and Brooklyn Railroad Com-  
pany and the Other Defendants Above Named to the Complain-  
ant's Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledg-  
ing all or any of the matters or things in the said bill of complaint  
contained to be true in such manner and form as the same are  
therein set forth and alleged, do demur to the said bill, and for cause  
of demurrer show that said bill doth not contain any matter of equity  
whereon this court can ground any decree or give to the complainant  
any relief against these defendants or any one or more of them, and  
that it appeareth by the complainant's own showing by the said bill  
that he is not entitled to the relief prayed by the said bill of com-  
plaint against these defendants.

Wherefore, and for divers other good causes of demurrer  
20 appearing in the said bill, these defendants separately and  
severally demur thereto and pray the judgment of this hon-  
orable court whether they shall be compelled to make any answer to  
said bill, and they humbly pray to be hence dismissed with their  
reasonable costs in this behalf sustained.

DYKEMAN, OELAND & KUHN,  
*Solicitors for Defendants, 189 Montague*  
*Street, Brooklyn, N. Y.*

I, William N. Dykman, of counsel for the defendants in the above  
cause, do hereby certify that the foregoing demurrer to the bill of  
complaint is in my opinion well founded in law.

WILLIAM H. DYKMAN.

UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, S. W. Huff, being duly sworn, depose and say that I am Presi-  
dent of The Coney Island and Brooklyn Railroad Company, one

of the defendants above named, and that the foregoing demurrer is not interposed for the purposes of delay.

S. W. HUFF.

Sworn to before me this 24th day of January, 1910.

JOHN A. THAKE,  
*Notary Public, Kings County, N. Y.*

Endorsed: Due service of a copy of within Demurrer is hereby admitted. Dated January 21, 1910, Alexander & Green, Attorney for Complainant. U. S. Circuit Court, Southern District of N. Y. Filed Jan. 24, 1910. John A. Shields, Clerk.

21 *Notice of Hearing on Bill and Demurrer.*

In the Circuit Court of the United States for the Southern District  
of New York.

In Equity.

WYCKOFF VAN DERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and  
Slaughter W. Huff, William N. Dykman, James H. Hyde, George  
H. Prentiss, William H. McIntyre, Charles T. Young, John H.  
Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards,  
Edwin S. Marston, Allan McCulloh, and Duncan B. Cannon,  
Directors of said Company, Defendants.

You will please take notice that this cause will be brought to a hearing on bill and demurrer filed therein before Honorable Learned Hand, United States judge, on the 25th day of January, 1910, at twelve o'clock noon or as soon thereafter as counsel can be heard.

Dated, New York, January 25th, 1910.

ALEXANDER & GREEN,  
*Solicitors for Complainant, 120 Broadway,*  
*New York City, N. Y.*

To Messrs. Dykman, Oeland & Kuhn, Solicitors for Defendants,  
189 Montague Street, Brooklyn, N. Y.

Due and timely service of the foregoing notice of hearing in the above-entitled suit is hereby admitted.

Dated, January 25, 1910.

DYKMAN, OELAND & KUHN,  
*Solicitors for Defendants.*

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

22      *Final Decree Sustaining Demurrer and Allowance of Appeal*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office and Court House Building, in the City of New York (Borough of Manhattan), this 25th Day of January, A. D. 1910.

Present: Honorable Learned Hand, U. S. Judge.

In Equity.

WYCKOFF VANDERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and  
Slaughter W. Huff, William N. Dykman, James H. Hyde,  
George H. Prentiss, William H. McIntyre, Charles T. Young,  
John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy  
Richards, Edwin S. Marston, Allan McCulloh and Duncan B.  
Cannon, Directors of Said Company, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having heard in support of said demurrer and in opposition thereto, it is by the court now here—

Ordered and decreed that the said demurrer be sustained, and that the bill of complaint of the complainant above named be, and the same is hereby, dismissed with costs.

LEARNED HAND, U. S. J.

Thereupon the above-named complainant states that in this case the constitutionality of a law of the United States is drawn  
23      in question and in open court prays an appeal from said final decree direct to the Supreme Court of the United States pursuant to the statute in such case made and provided. It is therefore further—

Ordered that the said appeal be, and the same is hereby, allowed as prayed for in open court.

The said defendants then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

LEARNED HAND, U. S. J.

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25, 1910, John A. Shields, Clerk.

24

*Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

WYCKOFF VANDERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and  
Slaughter W. Huff, William N. Dykman, James H. Hyde,  
George H. Prentiss, William H. McIntyre, Charles T. Young,  
John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy  
Richards, Edwin S. Marston, Allan McCulloh and Duncan B.  
Cannon, Directors of Said Company, Defendants.

And now comes the complainant above-named, by Alexander & Green, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the 25th day of January, 1910, dismissing complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the Court erred in refusing to hold that so much of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, as relates to the levying and collection of a special excise tax from certain corporations and joint stock companies, including the defendant The Coney Island and Brooklyn Railroad Company, measured by a percentage upon their net income, is unconstitutional, null and void, in that said provisions of said act require the imposition of a tax upon the exercise by the several States, and in their application to defendant The Coney Island and Brooklyn Railroad Company upon the exercise by the State of New York, of sovereign powers and functions not surrendered to the United States and specially reserved to the States by the Tenth Amendment to the Constitution of the United States.

II.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that in their application to defendant The Coney Island and Brooklyn Railroad Company the tax thereby attempted to be imposed is in effect an interference with a governmental agency or instrumentality of the State of New York.

## III.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that in their application to defendant The Coney Island and Brooklyn Railroad Company the tax thereby attempted to be imposed constitutes in effect an interference with the exercise by the State of New York of a governmental function.

## IV.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they  
26 provide for and require the imposition of a direct tax upon the real and personal property of corporations and joint stock companies, and in their application to defendant The Coney Island and Brooklyn Railroad Company upon the real and personal property of such Company, without apportionment among the several States according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

## V.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, measured not by the amount of business done by such corporations or joint stock companies, but by the entire net income of such corporations or joint stock companies, over and above \$5,000, received by them from all sources, in violation of the Constitution of the United States and in particular of the Due Process Clause of the 5th Amendment thereof, and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the states and the people thereof.

## VI.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with  
27 respect to the carrying on or doing business by such corporations and joint stock companies, without subjecting to such tax copartnerships and individuals engaged in carrying on or doing similar businesses, in violation of the Constitution of the United States and in particular of Section 8 of Article I and the Due Process Clause of the 5th Amendment thereof and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the States and the people thereof.

## VII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies without subjecting to such tax labor, agricultural and horticultural organizations and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members.

## VIII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require a larger tax in the case of the defendant The Coney Island and Brooklyn Railroad Company by reason of the fact that its indebtedness exceeds the amount of its paid up capital stock, than is imposed upon other corporations engaged in the same general business whose capital stock equals or exceeds their indebtedness.

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## IX.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that under the provisions thereof the corporations and joint stock companies made subject to the tax therein provided for, and in particular the defendant the Coney Island and Brooklyn Railroad Company, may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to a forfeiture of their property, in violation of Articles IV and V of the Amendments to the Constitution of the United States.

## X.

That the Court erred in not granting to the complainant the relief prayed in and by his bill of complaint, or any part thereof.

## XI.

That the Court erred in sustaining the demurrer to said bill of complaint.

## XII.

That the Court erred in dismissing the said bill of complaint with costs.

Dated, New York, January 25, 1910.

ALEXANDER & GREEN,  
*Solicitors for Complainant.*

R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Of Counsel.*

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

*Supersedeas Bond.*

In the Circuit Court of the United States for the Southern District  
of New York.

In Equity.

WYCKOFF VANDERHOEF, Complainant,  
against

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and  
Slaughter W. Huff, William N. Dykman, James H. Hyde, George  
H. Prentiss, William H. McIntyre, Charles T. Young, John F.  
Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richard  
Edwin S. Marston, Allan McCulloh and Duncan B. Cannon  
Directors of Said Company, Defendants.

Know all men by these presents that we, Charles E. Phelps and  
Samuel S. McCurdy, are held and firmly bound unto the above  
named defendants in the sum of Five hundred dollars (\$500) to be  
paid to the said defendants: for the payment of which, well and truly  
to be made, we bind ourselves and each of us, our and each of our  
heirs, executors, and administrators, jointly and severally, firmly by  
these presents.

Sealed with our seals and dated the 25th day of January, in the  
year of our Lord 1910.

The condition of this obligation is such that whereas the said de-  
fendants above named have obtained a decree in the Circuit Court  
of the United States for the Southern District of New York, sus-  
taining the defendants' demurrer and dismissing the bill of com-  
plaint of the complainant with costs, which said decree was  
30 entered on the 25th day of January, 1910; and whereas the  
said complainant Wyckoff Van Derhoef, in order to obtain  
reversal of the same, hath obtained the allowance in open court of  
petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above-named Wyckoff Van Derhoef shall  
prosecute his said appeal to effect and if he fail to make his plea  
good shall answer all damages and costs, then this obligation shall  
be void; otherwise the same shall remain in full force and virute.

CHARLES E. PHELPS. [L. s.]

SAMUEL S. McCURDY. [L. s.]

Sealed and delivered and taken and acknowledged this 25th day  
of January, 1910, before me.

[SEAL.]

R. DAMM,  
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

Approved by  
LEARNED HAND,  
U. S. Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 2,  
1910, John A. Shields, Clerk.



31 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from one to thirty inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause entitled Wyckoff Van Derhoef, Complainant-Appellant, against The Coney Island and Brooklyn Railroad Company and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, Directors of said Company, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of January, in the year of our Lord One Thousand Nine hundred and ten and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal of the U. S. Circuit Court, South Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

I hereby certify that the fee for certifying the transcript of record in the above entitled cause amounted to \$9.05.

[Seal of the U. S. Circuit Court, South Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

32 (Endorsed:) Wyckoff Vanderhoef, Compl't-Appellant, vs.  
 The Coney Island and Brooklyn Railroad Co. et als., Def'ts-  
 Appellees. Transcript of Record on Appeal.

Endorsed on cover: File No. 21,977. S. New York, C. C. U. S.  
 Term No. 751. Wyckoff Van Derhoef, Appellant, vs. The Coney  
 Island & Brooklyn Railroad Company et al. Filed January 26th,  
 1910. File No. 21,977.



# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 752-40

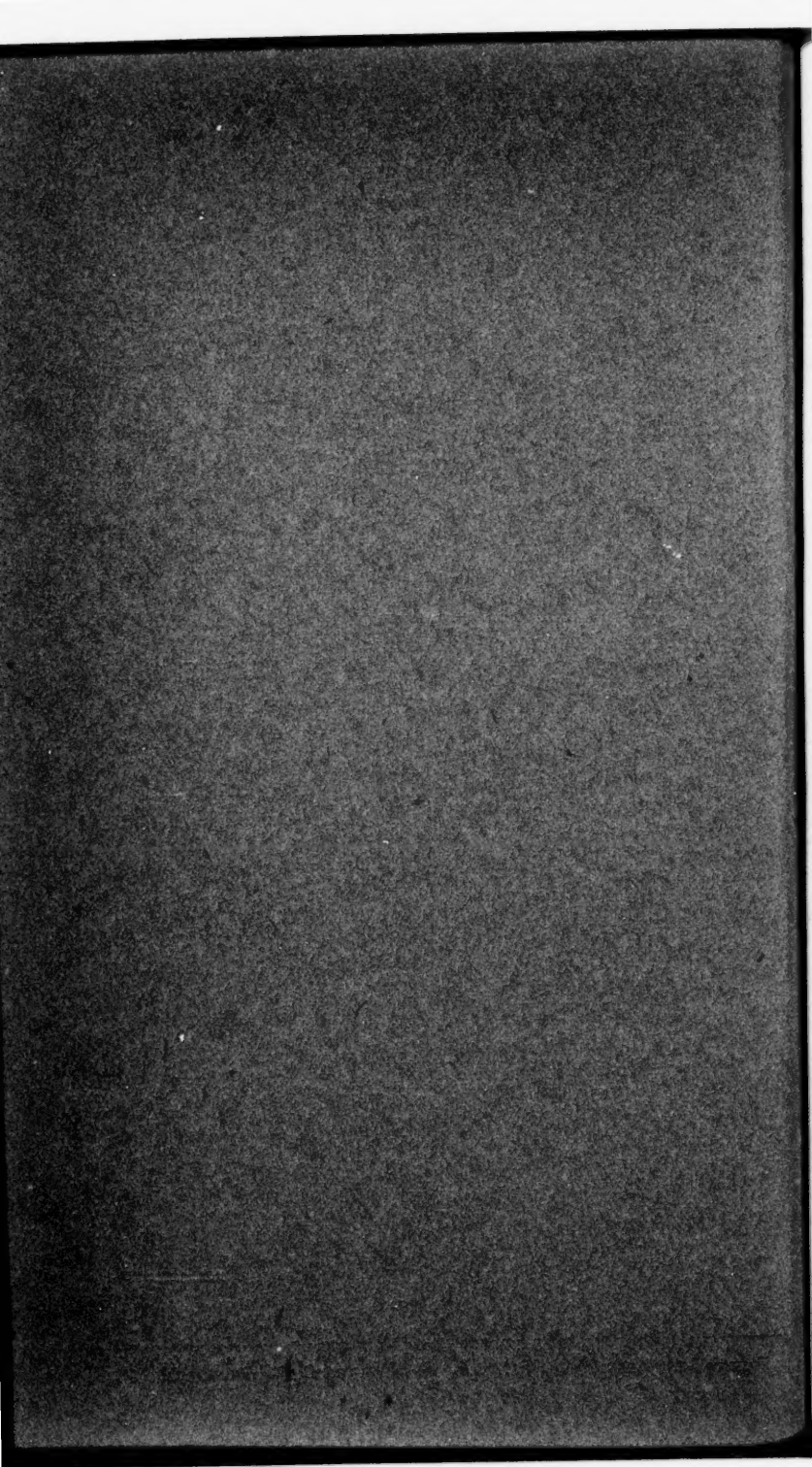
FRANCIS L. HINE, APPELLANT,

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 25, 1941

(21,978)



(21,978)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 752.

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FRANCIS L. HINE, APPELLANT,

v8.

HOME LIFE INSURANCE COMPANY ET AL.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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*Bill of Complaint.*

In the Circuit Court of the United States for the Southern District  
of New York.

In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY, and THOMAS H. MESSENGER, J.  
Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E.  
Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John  
E. Borne, William M. St. John, John S. Frothingham, Martin  
Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven,  
Robert B. Woodward, William A. Marshall and William G. Low,  
Jr., Directors of Said Company, Defendants.

To the Judges of the Circuit Court of the United States for the  
Southern District of New York, in the Second Circuit, Sitting  
in Equity:

Your orator, Francis L. Hine, a citizen of the State of New York,  
and a resident of the Borough of Manhattan in the City of New  
York in said State, brings this his bill of complaint in behalf of  
himself and all other stockholders and policyholders of the defendant  
Home Life Insurance Company who are similarly situated and who  
shall be entitled to avail themselves of the benefit of this suit,  
against said Home Life Insurance Company, and Thomas H. Mes-  
senger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George  
E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John  
E. Borne, William M. St. John, John S. Frothingham, Martin Joost,  
E. LeGrande Beers, Courtland P. Dixon, Anton A. Raven, Robert  
B. Woodward, William A. Marshall and William G. Low, Jr.,  
as directors thereof, and thereupon complains and shows:

First. That the defendant Home Life Insurance Company  
is a corporation duly organized and existing under and by virtue  
of the laws of the State of New York relating to life insurance com-  
panies and is a citizen of said State; that the principal office of said  
company is in the Borough of Manhattan in the Southern District  
of New York; that its capital stock now consists, and for many years  
past has consisted, of the sum of \$125,000, divided into 1250  
shares of the par value of \$100 each, and that its capital stock,  
accumulated profits and other assets exceed in value the sum of \$22,-  
000,000.

Second. That said defendant Home Life Insurance Company is  
authorized by its charter and the public laws of the State of New  
York to make insurance on the lives of individuals and every  
insurance appertaining thereto or connected therewith, and to  
grant, purchase or dispose of annuities, and that such is the busi-  
ness in which it is engaged: that it is required by the laws of the

State of New York to invest its capital to the extent of \$100,000, in the stocks or bonds of the United States or of the State of New York or in the bonds of a county or incorporated city of said State authorized to be issued by the Legislature thereof, or in bonds and mortgages on improved unencumbered real property in the State of New York, and is authorized by said laws to invest the residue of its capital and its surplus money and funds in the securities aforesaid or in the public stocks or bonds of any one of the United States, or upon the security of improved unencumbered real property in any

3 state, or, within certain limitations, in the stocks, bonds, or other evidences of indebtedness of any solvent institution incorporated under the laws of the United States or of any state thereof, or in such real estate as may be requisite for the convenient transaction of its business.

Third. That the property and assets of said defendant Home Life Insurance Company amounted on the thirty-first day of December, 1908, to the sum of \$21,708,000 and upwards, as appears by the report of said company to the Superintendent of Insurance for the State of New York for the year 1908; that, as also appears by said report, said assets were then invested as follows: In real estate owned by said company in fee \$1,643,609.81; in United States Government bonds \$11,193; in bonds of the State of New York \$109,500; in corporate stocks of the City of New York \$102,160; in bonds of other municipal corporations within the United States \$53,800; in the bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States upwards of \$10,000,000; and in real estate bonds and mortgages \$6,105,030. That as appears by said report the assets of said defendant Company, on December 31, 1908, invested as aforesaid, included \$1,112,000 and upwards of "unassigned funds", said unassigned funds being undivided profits. Your orator is informed and believes and therefore alleges that the assets and "unassigned funds" aforesaid of said corporation have increased since December 31, 1908, and that it still retains substantially all of the aforesaid investments and derives a large income therefrom.

Fourth. That the net income of the defendant Home Life Insurance Company during the year ending December 31, 1909,  
4 amounted to a sum in excess of \$450,000 after making all deductions of the character provided for in the second and third paragraphs of Section 38 of the Act of Congress approved August 5th, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes", a large part of which income was derived from the investments hereinbefore mentioned.

Fifth. That by the laws of the State of New York and the charter of the said Home Life Insurance Company, it is, among other things, provided that the corporate powers of said Company shall be vested in a Board of Directors to consist of not less than thirteen nor more than twenty-three persons, and that said powers shall be exercised by such Board and by such officers and agents as it may appoint and empower. The defendants Thomas H. Messenger, J.



Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. LeGrande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., together with your orator, constitutes the present Board of Directors of said Company, and as such are now managing and conducting all and singular the business and affairs of said Company.

Sixth. Your orator further shows that he became the owner and registered holder of ten shares of the capital stock of said defendant Home Life Insurance Company a number of years ago, and that he has ever since been and still is the registered holder and  
5 owner in his own right of said shares, the value of which exceeds the sum of \$2000. By the charter of said Home Life

Insurance Company it is provided that the holders of its capital stock shall be entitled to receive semi-annually out of the net profits of said Company six per cent in dividends on the amount of stock held by them respectively, but that beyond the amount of their capital stock and the dividends aforesaid, they shall not share in the funds or profits of the Company except as they may be entitled as policyholders, and then equally with other holders of policies in said Company. That capital stock of said Home Life Insurance Company is divided among a large number of different persons who, as such stockholders, constitute a large body, and this suit is for an object common to them all. The charter of said Home Life Insurance Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company unless it shall be otherwise agreed between the Company and the insured, and further provides that the net profits of said Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. On or about the sixth day of November, 1891, said Company issued to your orator its policy of insurance, which policy is still in force, whereby it promised to pay to your orator the amount of \$2500 on the sixth day of November, 1911, or in case of his previous decease to his wife Mary I. Hine, or if she shall not survive him to his executors, administrators or assigns, and in the

6 meantime to accord to your orator participation in the profits of the Company as the same should be ascertained and apportioned from year to year according to the said provisions of its charter. The policyholders of said Home Life Insurance Company holding policies which entitle them to share annually in the profits of said Company, are very numerous, comprising, as your orator is informed and believes, more than forty-three thousand in number and representing in the aggregate more than eighty-one million Dollars of life insurance, and this suit is for an object common to them all. Your orator therefore brings this suit in his own name and in his own behalf as a stockholder and policyholder in said Home Life Insurance Company and also as a representative and on behalf of such of the other stockholders and policyholders in said

Company as are similarly situated and interested and may choose to intervene and become parties hereto.

Seventh. That the defendant Home Life Insurance Company and a majority of its directors assert and declare that they intend to voluntarily make and file with the Collector of Internal Revenue, prior to the first day of March, 1910, a return or statement in the form prescribed by Section 38 of the Act of Congress of the United States entitled, "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes", approved August 5th, 1909, showing in detail the amount of net income of said Company for the year ending December 31, 1909 and to voluntarily pay to the said Collector of Internal Revenue, on or before the 30th day of June, 1910, a tax of one per cent upon the entire net income of the said Home Life Insurance Company over and above Five Thousand Dollars received by it from all sources during the calendar year ending December 31, 1909, after making the deductions provided for in said Act. Your orator further shows that the tax which the defendant Home Life Insurance Company would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said section of said Act would exceed the sum of \$4500.

Eighth. Your orator avers that the provisions of said Act purporting to levy upon corporations, joint stock companies or associations organized for profit and having a capital stock represented by shares, and insurance companies, a special excise tax with respect to the carrying on or doing business by such corporations or companies, measured by a percentage upon their net income as aforesaid, are unconstitutional, null and void in that:

(a) If the tax attempted to be imposed by said Act is to be regarded as a tax upon the franchises or the exercise of the franchises of such corporations and companies, it is a tax upon the exercise by the several States of sovereign powers and functions not surrendered to the United States and specially reserved to them by the Tenth Amendment to the Constitution of the United States, and of privileges granted thereunder.

(b) If said tax is to be regarded as a tax not upon the privilege of exercising corporate or other franchises but upon such franchises regarded as property, the provisions attempting to impose the same are unconstitutional, null and void, in that said tax is direct and is not apportioned among the several States according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

8 (c) If the said tax is to be regarded as a tax not upon corporate or other franchises but upon the net income of the corporations and companies subject thereto, the provisions of the Act attempting to impose the same are unconstitutional, null and void, in that the tax is imposed upon the income derived from stock and bonds issued by the several States and the municipalities thereof which are beyond the taxing powers of Congress; and furthermore in that the tax is imposed upon income derived from real estate and personal property, and is therefore in effect a direct tax upon such

property, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article I of the Constitution of the United States.

(d) If the said tax is to be regarded as a tax upon occupation or the carrying on of business, the provisions of the Act attempting to impose the same are unconstitutional, null and void, in that the tax is not uniform throughout the United States as required by Section 8 of Article I of the Constitution of the United States, and in that the same is arbitrary and unequal, in violation of the said Constitution and the Fifth Amendment thereof and the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the General Government by the States and the people thereof.

And your orator avers that the said tax falls within one or more of the aforesaid classes of taxes.

Ninth. Your orator avers that the said tax attempted to be imposed by the 38th Section of said Act is unequal and arbitrary, and is not uniform throughout the United States:

(a) Because the tax is measured, not by the income derived from the business carried on but by the income of the owner derived from all sources whatsoever;

9 (b) Because corporations and associations, known as fraternal beneficiary societies, operating under the lodge system, are exempted in and by said Act from all liability for the tax imposed thereby, whereas insurance companies doing the same or a substantially similar business but not operating under the lodge system are made liable to the tax;

(c) Because labor, agricultural and horticultural organizations, and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, are exempted in and by said Act from all liability for the tax imposed thereby;

(d) Because said tax is imposed upon corporations, joint stock and insurance companies, measured by a percentage upon their net income, whereas no similar tax is imposed upon the income of individuals and ordinary partnerships even when engaged in the same line of business;

(e) Because all corporations and joint stock companies whose net income for any one calendar year does not exceed five thousand dollars are specifically exempted in and by said Act from the tax imposed thereby.

Tenth. Your orator further avers that the provisions of said Act prescribing said tax are unconstitutional, null and void, in that the corporations and companies subject thereto may, by virtue of the aforesaid arbitrary and unequal exactions of such provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

Eleventh. Your orator further avers that the provisions  
10 for said tax incorporated in said Act of Congress, as aforesaid, are unconstitutional, null and void, in that the corporations and companies thereby attempted to be taxed may be compelled to produce and disclose their private books and papers in order to make

them liable to a penalty or to forfeit their property in violation of Articles IV and V of the Amendments to the Constitution of the United States.

Twelfth. Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that he has duly requested the defendant Home Life Insurance Company and its directors, other than your orator, and each of them, in writing, to omit and refuse to pay and to refrain from paying said tax, and to contest the constitutionality of said Act, and to refrain from voluntarily making the return required by said Act, and to apply to a Court of competent jurisdiction to determine said Company's liability under said Act, and that a copy of said request is hereto annexed as Exhibit "A" and made a part of this bill of complaint; but that said defendant Home Life Insurance Company and a majority of its directors after a meeting of said directors at which the matter and said request Exhibit "A" were formally laid before them for action, refused and still refuse and intend omitting to comply with your orator's demand, and, have resolved, determined and intend to comply with all and singular the provisions of said Act of Congress, and to make the return therein provided for, and to pay the tax upon said Company's net income thereby sought to be imposed. That a

11      copy of the refusal of said defendant Home Life Insurance Company is annexed as Exhibit "B" to this complaint. That your orator was present at such meeting and voted against the resolution set forth in said Exhibit "B."

Thirteenth. Your orator further shows that if the defendant Home Life Insurance Company and its directors, as they propose and have declared their intention to do, pay said tax upon the net income of the defendant Home Life Insurance Company, they will thereby diminish the assets of said Company and lessen the fund applicable to the payment of dividends on your orator's stock and your orator's insurance policy and on the stock and insurance policies held by other stockholders and policyholders of said Home Life Insurance Company similarly situated with your orator, and will thereby lessen the value of your orator's said stock and said insurance policy and the value of the stock and insurance policies of all other stockholders and policyholders who are similarly situated. Your orator further shows that it would be impossible to ascertain and measure the amount of damage and loss to your orator which would result from the payment of said tax or the amounts by which the value of your orator's aforesaid stock and insurance policy would thereby be lessened, and that the damage to your orator would therefore be irreparable and incapable of ascertainment in an action at law.

Fourteenth. Your orator further shows that the voluntary compliance by the defendant Home Life Insurance Company with the provisions of said Act of Congress will expose the defendant Home Life Insurance Company to the risk of a multiplicity of suits not only  
12      by and on behalf of its numerous shareholders but also by and on behalf of its numerous policyholders, and that in such suits all the policyholders of the Company, including

your orator, would or might be necessary and proper parties by reason of their interest in the net income of said Company and in preserving the same for distribution among its policyholders, and that such numerous suits would work irreparable injury to the business of said Company and to your orator and to the Company's other stockholders and participating policyholders.

Fifteenth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two thousand dollars, and arises under the Constitution and laws of the United States.

That the action contemplated by the defendant Home Life Insurance Company and its directors, the individual defendants, in voluntarily complying with the provisions of said Act of Congress, as aforesaid, is contrary to equity and good conscience and will tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and for as much as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays

1. That it be adjudged and decreed that the said taxing provisions incorporated in the 38th Section of said Act of Congress approved August 5, 1909, are unconstitutional null and void;

2. That the defendants be restrained from voluntarily complying with the said provisions of said Act and from making the return or statement required thereby and from paying the tax aforesaid;

3. That the defendant Home Life Insurance Company be required to specifically perform the terms of the policy contract held by your orator and the policies held by other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of said Company for the year 1909, without subtraction or diminution by reason of anything contained in the said 38th Section of the Act of Congress approved August 5th, 1909.

4. That your orator may have such other and further or different relief in the premises as to a Court of Equity may seem meet.

To the end therefore that said defendants may if they can show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said Home Life Insurance Company under its corporate seal and the said individual defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpoena *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendants Home Life Insurance Company and Thomas H. Messenger, J. Warren Greene, H. E. Pierpont.

Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., as directors of said Home Life Insurance Company, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answers make to all and singular the premises, and further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed, and your orator as in duty bound will ever pray, &c.

ALEXANDER & GREEN,  
Solicitors for Complainant,  
120 Broadway, New York City.

R. V. LINDABURY,  
ROBERT LYNN COX,  
CHARLES W. PIERSON,  
Of Counsel.

15 UNITED STATES OF AMERICA,  
Southern District of New York,  
County of New York, ss:

Francis L. Hine, the complainant in the foregoing bill named, being duly sworn on his oath says that the matters and things in the said bill set forth in so far as they relate to his own acts and deeds are true and so far as they relate to the acts and deeds of others he believes them to be true.

FRANCIS L. HINE.

Sworn and subscribed to before me this 19 day of January, 1910.  
[SEAL.] THOS. T. GRACE,  
Notary Public, N. Y. Co.

16 EXHIBIT "A."

To Home Life Insurance Company and to Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtlandt P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of Said Company.

SIRS: I am a shareholder and policyholder in the Home Life Insurance Company and am informed that the Company intends to voluntarily comply with the requirements of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the

United States and for other Purposes," which became a law August 5th, 1909, and which purports to impose a special excise tax upon all insurance companies in the United States equivalent to one per cent upon their annual net income beginning with the year ending December 31, 1909.

I claim that the provisions of said Act in respect to said tax are unconstitutional. As a stockholder and policyholder of said Home Life Insurance Company, I hereby protest against any action of the Company and its Directors in voluntarily complying with the provisions of said Act imposing the tax, and I request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions and voluntarily paying the tax provided for therein, and from voluntarily making returns and statements in its behalf. I further request that said Company and its Directors shall contest the constitutionality of said Act and protect its stockholders and policyholders, and apply to a court of competent jurisdiction to determine its liability under said Act or take such steps as may be necessary to protect the rights of the Company's shareholders and policyholders.

Yours very truly,

(Sgd.)

FRANCIS L. HINE.

17

EXHIBIT "B."

At a regular meeting of the Board of Directors of the Home Life Insurance Company, held at the office of the Company, in the Borough of Manhattan, City of New York, on January 17th, 1910, the following resolution was duly adopted, Mr. Francis L. Hine voting in the negative:

Resolved: that the Board of Directors deem it inexpedient to comply with the demand of Mr. Hine, on the ground that the failure to comply with the provisions of Section 38 of the Act of Congress entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes" approved August 5, 1909, would subject the Company to litigation with the United States or the revenue officers thereof.

(Sgd.)

E. W. GLADWIN, *Secretary*.

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 22, 1910, John A. Shields, Clerk.



*Demurrer.*

In the Circuit Court of the United States for the Southern District  
of New York.

## In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J.  
Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E.  
Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John  
E. Borne, William M. St. John, John S. Frothingham, Martin  
Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven,  
Robert B. Woodward, William A. Marshall, and William G. Low,  
Jr., Directors of said Company, Defendants.

The Demurrer of the Home Life Insurance Company and the Other  
Defendants Above Named to the Complainant's Bill of Complaint  
Herein.

These defendants, by protestation, not confessing or acknowledging  
all or any of the matters or things in the said bill of complaint con-  
tained to be true in such manner and form as the same are therein  
set forth and alleged, do demur to the said bill, and for cause of  
demurrer show that said bill doth not contain any matter of equity  
whereon this court can ground any decree or give to the complainant  
any relief against these defendants or any one or more of them, and  
that it appeareth by the complainant's own showing by the said  
bill that he is not entitled to the relief prayed by the said bill against  
these defendants.

Wherefore, and for divers other good causes of demurrer  
19 appearing in the said bill, these defendants separately and  
severally demur thereto and pray the judgment of this  
honorable court whether they shall be compelled to make any  
answer to said bill, and they humbly pray to be hence dismissed with  
their reasonable costs in this behalf sustained.

HOWARD VAN SINDEREN,

*Solicitor for Defendants, 44 Wall Street, New York.*

I, Howard Van Sinderen, of counsel for the defendants in the  
above cause, do hereby certify that the foregoing demurrer to the  
bill of complaint is in my opinion well founded in law.

HOWARD VAN SINDEREN.

UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, George E. Ide, being duly sworn, depose and say that I am the  
president of Home Life Insurance Company, one of the defendants  
above named, and that the foregoing demurrer is not interposed for  
purposes of delay.

GEO. E. IDE.



Subscribed and sworn to before me this 24 day of January, 1910.

[L. S.]

L. A. BUTLER,  
*Notary Public, New York County, N. Y.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25,  
1910, John A. Shields, Clerk.

20                      *Notice of Hearing on Bill and Demurrer.*

In the Circuit Court of the United States for the Southern District  
of New York.

In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J.  
Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E.  
Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John  
E. Borne, William M. St. John, John S. Frothingham, Martin  
Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven,  
Robert B. Woodward, William A. Marshall, and William G. Low,  
Jr., Directors of said Company, Defendants.

You will please take notice that this cause will be brought to a  
hearing on bill and demurrer filed therein before Honorable Learned  
Hand, United States judge, on the 25th day of January, 1910, at  
twelve o'clock noon or as soon thereafter as counsel can be heard.

Dated, New York, January 25th, 1910.

ALEXANDER & GREEN,  
*Solicitors for Complainant.*  
120 Broadway, New York City, N. Y.

To Howard Van Sinderen, Esq., Solicitor for defendants, 44 Wall  
Street, N. Y. City.

Due and timely service of the foregoing notice of hearing in the  
above-entitled suit is hereby admitted.

Dated, January 25th 1910.

HOWARD VAN SINDEREN,  
*Solicitor for Defendants.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25,  
1910, John A. Shields, Clerk.

21 *Final Decree Sustaining Demurrer and Allowance of Appeal*

At a stated term of the Circuit Court of the United States for the Southern District of New York, held at the United States Post Office and Court House building, in the City of New York (Borough of Manhattan), this 25th day of January, A. D. 1910.

Present: Honorable Learned Hand, U. S. Judge.

In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George I. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall, and William G. Lovell, Jr., Directors of said Company, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the court now here—

Ordered and decreed that the said demurrer be sustained, and that the bill of complaint of the complainant above named be and the same is hereby, dismissed with costs.

LEARNED HAND, U. S. J.

Thereupon the above-named complainant states that in this case the constitutionality of a law of the United States is drawn in question and in open court prays an appeal from said final decree direct to the Supreme Court of the United States pursuant to the statute in such case made and provided. It is therefore further—

22 Ordered that the said appeal be, and the same is hereby, allowed as prayed for in open court.

The said defendants then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

LEARNED HAND, U. S. J.

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25, 1910, John A. Shields, Clerk.

*Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall, and William C. Low, Jr., Directors of said Company, Defendants.

And now comes the complainant above-named by Alexander & Green, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the 25th day of January, 1910, dismissing complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the court erred in refusing to hold that so much of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, as relates to the levying and collection of a special excise tax from certain corporations and joint stock companies, including the defendant Home Life Insurance Company, measured by a

24 percentage upon their entire net income, is unconstitutional, null and void in that said provisions of said Act constitute an interference with the sovereign powers and functions of the several states and, in their application to defendant Home Life Insurance Company, with the sovereign powers and functions of the State of New York.

II.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon the exercise by the several states of sovereign powers and functions not surrendered to the United States and specially reserved to them by the 10th Amendment of the Constitution of the United States.

III.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide

for and require the imposition of a tax upon privileges and franchises granted by the several states, and in their application to the defendant Home Life Insurance Company upon privileges and franchises granted to it by the State of New York in pursuance of the sovereign and exclusive powers and functions of said State.

#### IV.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a direct tax upon the real  
25 and personal property of corporations and joint stock companies, and in their application to defendant Home Life Insurance Company upon the real and personal property of such company, without apportionment among the several states according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

#### V.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon the income derived from state and municipal stocks and bonds owned by corporations and joint stock companies, and in their application to defendant Home Life Insurance Company upon the income derived from state and municipal stocks and bonds owned by such Company.

#### VI.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, measured not by the amount of business done by such corporation or joint stock companies, but by the entire net income of such corporations or joint stock companies, over and above \$5,000, received by them from all sources, in violation of the Constitution of the United States and in particular of the Due Process  
Clause of the 5th Amendment thereof, and of the fundamental principles of taxation, and in excess of the powers of taxation  
26 surrendered to the general government by the states and the people thereof.

#### VII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, without subjecting to such tax co-partnerships and individuals engaged in carrying on or doing similar businesses, in violation of the Constitution of the United States and in particular

of Section 8 of Article I and the Due Process Clause of the 5th Amendment thereof and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the states and the people thereof.

### VIII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon insurance companies with respect to the carrying on or doing business by such companies, without subjecting to such tax corporations and associations known as fraternal beneficial societies doing the same business but operating under the lodge system.

27

### IX.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies without subjecting to such tax labor, agricultural and horticultural organizations and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members.

### X.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that under the provisions thereof the corporations and joint stock companies made subject to the tax therein provided for, and in particular the defendant Home Life Insurance Company, may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to a forfeiture of their property, in violation of Articles IV and V of the Amendments to the Constitution of the United States.

### XI.

That the Court erred in not granting to the complainant the relief prayed in and by his bill of complaint, or any part thereof.

### XII.

That the Court erred in sustaining the demurrer to said bill of complaint.

28

### XIII.

That the Court erred in dismissing the said bill of complaint with costs.

Dated, New York, January 25, 1910.

ALEXANDER & GREEN,  
*Solicitors for Complainant.*

R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Of Counsel.*

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,  
against

HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of said Company, Defendants.

Know all men by these presents that we, Charles E. Phelps and Samuel S. McCurdy, are held and firmly bound unto the above-named defendants in the sum of Five hundred dollars (\$500) to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of January, in the year of our Lord 1910.

The condition of this obligation is such that whereas the said defendants above named have obtained a decree in the Circuit court of the United States for the southern district of New York, sustaining the defendants' demurrer and dismissing the bill of complaint of the complainant with costs, which said decree was  
30 entered on the 25th day of January, 1910; and whereas the said complainant Francis L. Hine, in order to obtain a reversal of the same, hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above-named Francis L. Hine shall prosecute his said appeal to effect and if he fail to make his plea good shall answer all damages and costs, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

CHARLES E. PHELPS. [L. S.]  
SAMUEL S. McCURDY. [L. S.]

Sealed and delivered and taken and acknowledged this 25th day of January, 1910, before me.

[SEAL.]

R. DAMM,  
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

Approved by  
LEARNED HAND,  
U. S. Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

31 UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from one to thirty inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Francis L. Hine, Complainant-Appellant, against Home Life Insurance Company and Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of said Company, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of January, in the year of our Lord One thousand Nine hundred and ten, and of the Independence of the said United States the One hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

I hereby certify that the fee for certifying the transcript of record in the above entitled cause amounted to \$9.05.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

31½ [Endorsed:] Francis L. Hine, compl't-Appellant, vs. Home Mutual Insurance Co., def'ts-appellees. Transcript of record on appeal.

32 Endorsed on cover: File No. 21,978. S. New York C. C. U. S. Term No. 752. Francis L. Hine, appellant, vs. Home Life Insurance Company et al. Filed January 26th, 1910. File No. 21,978.





Office Supreme Court, U. S.

FILED.

JAN 27 1910

JAMES H. McKENNEY,  
*Clerk*

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1909.

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No. ~~751~~ 409

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WYCKOFF VAN DERHOEF, APPELLANT,

vs.

THE CONEY ISLAND & BROOKLYN RAILROAD  
COMPANY ET AL.

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**MOTION TO ADVANCE**

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R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Counsel for Appellant.*

(21,977.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

---

No. 751.

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WYCKOFF VAN DERHOEF, APPELLANT,

v.

THE CONEY ISLAND & BROOKLYN RAILROAD  
COMPANY ET AL., APPELLEES.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

**MOTION TO ADVANCE UNDER RULE 26.**

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

1.

In this cause the constitutionality of a law of the United States (the so-called Corporation Tax Act, being Section 38 of the Act approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes") is drawn in question. The constitutionality of the same law is involved in *Flint vs. The Stone Tracy Company et al.*, No. 747, in

which a motion to advance was made January 24, 1910. As will be hereinafter shown this cause raises questions touching the constitutionality of said act which are not directly raised in the Flint case.

## 2.

A brief statement of the matter involved is as follows: Complainant is a stockholder of the defendant, The Coney Island and Brooklyn Railroad Company, a corporation owning and operating certain street railroads in the State of New York, and brings this suit in his own behalf (and in behalf of other stockholders similarly situated) against the said corporation and its directors to restrain them from voluntarily making returns and paying the tax imposed by said Act. The Act is alleged to be unconstitutional under Article 1, Section 8, and the Fifth and Tenth Amendments of the Constitution of the United States, and on the further ground that the same constitutes an interference with the sovereign powers, prerogatives and functions of the States, and particularly of the State of New York. The matter in dispute exceeds two thousand dollars.

## 3.

Defendants filed a general demurrer to the Bill and the cause came on to be heard on Bill and Demurrer in the United States Circuit Court for the Southern District of New York, whence, the demurrer being sustained and the Bill of Complaint dismissed with costs, the complainant prayed an appeal to this court which was duly allowed.

## 4.

The cause involves issues of public importance affecting most of the corporations in the United States. Among other questions raised in this suit which are not directly raised in the Flint case are the question whether Congress has power to tax franchises granted by a State to a public service

corporation; and whether a larger tax can be imposed upon a corporation whose indebtedness exceeds the amount of its paid-up capital stock than upon other corporations engaged in similar business whose capital stock exceeds their indebtedness.

## 5.

Unless this appeal is heard and determined before June 30, 1910, the defendants will voluntarily pay the tax in question and appellant will be remediless and will be unable to obtain relief even though this court should later determine that the Act is unconstitutional.

## 6.

Appellant therefore prays this honorable court that this case may be advanced upon the docket and heard together with the Flint case at as early a date as may be convenient to the court.

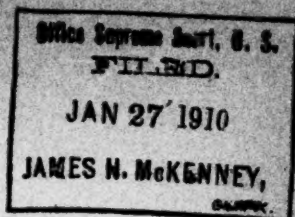
Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this court.

Respectfully submitted,

R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Of Counsel for Appellant.*

WASHINGTON, *January* 26, 1910.





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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No. ~~759~~ 440

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FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

---

MOTION TO ADVANCE.

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R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Counsel for Appellant.*

(21,978.)





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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No. 752.

---

FRANCIS L. HINE, APPELLANT,

*vs.*

HOME LIFE INSURANCE COMPANY ET AL.,  
APPELLEES.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

**MOTION TO ADVANCE UNDER RULE 26.**

---

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

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In this cause the constitutionality of a law of the United States (the so-called Corporation Tax Act, being Section 38 of the Act approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes") is drawn in question. The constitutionality of the same law is involved in *Flint vs. The Stone Tracy Company et al.*, No. 747, in which a motion to advance was made January 24, 1910. As will be hereinafter shown, this cause raises questions touch-

ing the constitutionality of said act which are not directly raised in the Flint case.

## 2.

A brief statement of the matter involved is as follows: Complainant is a stockholder and policy holder of Home Life Insurance Company, a New York corporation, and brings this suit in his own behalf (and in behalf of other stockholders and policy holders similarly situated) against the said corporation and its directors to restrain them from voluntarily making returns and paying the tax imposed by said Act. The Act is alleged to be unconstitutional under Article 1, Section 8, and the Fifth and Tenth Amendments of the Constitution of the United States, and on the further ground that the same constitutes an interference with the sovereign powers, prerogatives and functions of the States, and particularly of the State of New York. The matter in dispute exceeds two thousand dollars.

## 3.

Defendants filed a general demurrer to the Bill and the cause came on to be heard on Bill and Demurrer in the United States Circuit Court for the Southern District of New York, whence, the demurrer being sustained and the Bill of Complaint dismissed with costs, the complainant prayed an appeal to this court, which was duly allowed.

## 4.

The cause involves issues of public importance affecting most of the corporations in the United States. Among other questions raised in this suit which are not directly raised in the Flint case are the questions whether Congress has power to impose a tax of the character provided for in said Act upon insurance companies, excluding therefrom fraternal beneficiary societies, orders, or associations operating under the lodge system; and whether Congress can impose such

a tax upon life insurance companies measured in part by their net income derived from investments in the stocks and bonds of other corporations, and in particular from investments in the stocks and bonds of the State of their creation and of the municipalities thereof made pursuant to the requirements of the laws of such State.

## 5.

Appellant therefore prays this Honorable Court that this case may be advanced upon the docket and heard together with the Flint case at as early a day as may be convenient to the court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this court.

Respectfully submitted,

R. V. LINDABURY,  
CHARLES W. PIERSON,  
*Of Counsel for Appellant.*

WASHINGTON, *January 26, 1910.*



## CORPORATION TAX CASES.

---

Supreme Court of the United States.

OCTOBER TERM, 1909.

Nos. ~~751~~ AND ~~752~~.

*429 410*

WYCKOFF VANDERHOEF,

vs.

Office Supreme Court U. S.

FILED

MAR 11 1910

JAMES H. McKENNEY,

*Appellant,* Clerk.

THE CONEY ISLAND AND BROOKLYN RAILROAD  
COMPANY ET AL.,

*Appellees.*

FRANCIS L. HINE,

vs.

*Appellant,*

HOME LIFE INSURANCE COMPANY ET AL.,

*Appellees.*

## BRIEF FOR APPELLANTS.

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RICHARD V. LINDABURY,  
CHARLES W. PIERSON,  
ROBERT LYNN COX,

*Of Counsel for Appellants.*



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# Supreme Court of the United States,

OCTOBER TERM, 1909, NOS. 751 AND 752.

WYCKOFF VANDERHOEF,  
Appellant,

v.

THE CONEY ISLAND AND BROOK-  
LYN RAILROAD COMPANY *et*  
*al.*,

Appellees.

FRANCIS L. HINE,  
Appellant,

v.

HOME LIFE INSURANCE COM-  
PANY *et al.*,

Appellees.

## BRIEF FOR APPELLANTS.

### Statement.

These suits come up from the Circuit Court of the United States for the Southern District of New York.

Each case came on to be heard below on bill and general demurrer, and in each a final decree was entered sustaining the demurrer and dismissing the bill; and thereupon an appeal was prayed and allowed direct to this Court on the ground that

the constitutionality of a law of the United States was drawn in question.

As the questions of law involved in the two appeals are similar they will be dealt with in one brief. It will be necessary, however, to state the facts in the two suits separately.

**Number 751.**

This was a bill filed by Wyckoff VanDerhoef, a citizen of the State of New York, on behalf of himself and all other stockholders of the defendant company similarly situated, against The Coney Island and Brooklyn Railroad Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant corporation is a street railway company organized under the laws of the State of New York and owning and operating various street railroads situated within said State and upon the public streets thereof. Its right to construct and operate its railroads in the public streets has been conferred by various special acts of the Legislature of the State of New York. Under the laws of said State it is authorized, by reason of the public nature of its business, to exercise the right of eminent domain, and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings (Record, fols. 2-4).

The Capital Stock of said corporation consists of \$2,983,900, divided into shares of the par value of \$100 each. Said corporation has a bonded indebtedness of \$3,500,000 and other indebtedness in excess of \$200,000. Its net income from all

sources during the year ending December 31, 1909, amounted to more than \$205,000, after making all deductions of the character provided for in the Corporation Tax Act (Sec. 38 of the Act of Congress, approved August 5, 1909, entitled "An Act to provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes") (fols. 4-5).

The appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said corporation's capital stock, which shares are of large value. The capital stock of said corporation is divided among a large number of different persons, and this suit is for an object common to all (fol. 6). The said corporation and its directors have announced their intention voluntarily to comply with the provisions of the Corporation Tax Act, by making and filing the return and paying the tax therein provided for (fols. 6-7). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate (fols. 10-11, 16-17). The tax which the defendant corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said Act, would exceed the sum of \$2,000 (fol. 7). The bill charges that the provisions of the said Act imposing said tax are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued, it is unnecessary to set them forth here.

The bill further alleges that if the defendant corporation and its directors pay the tax, as they have declared their intention to do, they will thereby diminish the assets of the company and lessen the value of its stock and the dividends thereon, and that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits which would work irreparable injury to the business of the Company and involve it and its stockholders, including appellant, in irreparable loss (fol. 11). The bill further alleges that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000, and arises under the Constitution and laws of the United States, and that appellant and the other stockholders of the defendant corporation have no adequate remedy at law in the premises (fol. 12).

The prayer of the bill is that the taxing provisions of the said Act be adjudged unconstitutional, null and void, that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for, and for general relief (fol. 12).

#### Number 752.

This was a bill filed by Francis L. Hine, a citizen of the State of New York, on behalf of himself and all other stockholders and policyholders of the defendant company similarly situated, against Home Life Insurance Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant is a corporation organized under the laws of the State of New York and engaged

in the business of insuring lives. Its capital stock consists of \$125,000 divided into 1,250 shares of the par value of \$100 each, and its accumulated profits and other assets exceed in value the sum of \$22,000,000. By the laws of the State of New York the Company is required to invest its capital to the extent of \$100,000 in the stocks or bonds of the United States or of the State of New York or of the municipalities thereof, or in bonds and mortgages on improved unincumbered property in said State, and is authorized to invest the residue of its capital and its surplus moneys and funds in the securities aforesaid or in certain other specified kinds of real and personal property. The greater part of its assets are actually invested in real estate, United States Government bonds, bonds of the State of New York, corporate stocks of the City of New York, bonds of other municipal corporations within the United States, bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States, and real estate bonds and mortgages. (Record, fols. 2-3.) Included in its assets invested as aforesaid are \$1,112,000 and upwards of "unassigned funds," said unassigned funds being undivided profits (fol. 3). Its net income during the year ending December 31, 1909, amounted to a sum in excess of \$450,000 after making all deductions of the character provided for in the Corporation Tax Act (fol. 4). Appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said Company's capital stock of a value exceeding \$2,000. By the charter of said Company it is provided that the holders of its capital stock shall receive semi-annually dividends of six per cent., but shall not

further share in the profits of the Company except as they may be entitled as policyholders. The capital stock of the Company is divided among a large number of different persons, and this suit is for an object common to them all. The charter of the Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company (unless otherwise agreed between the Company and the insured), and further provides that the net profits of the Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. Appellant is the holder of a \$2,500 policy of life insurance issued by said Company in 1891, and under the terms thereof is entitled to participate in the profits of the Company as the same shall be ascertained and apportioned from year to year, according to the provisions of its charter. The policyholders of the Company holding participating policies are very numerous, comprising more than forty-three thousand and representing in the aggregate more than eighty-one million dollars of life insurance, and this suit is for an object common to them all (fols. 5-6). The corporation and its directors have announced their intention to voluntarily comply with the provisions of the Corporation Tax Act by making and filing the return and paying the tax therein provided for (fol. 6). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject



the corporation to litigation with the United States (fols. 10, 16-17). The tax which the corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of the Act would exceed the sum of \$4,500 (fol. 7). The bill charges that the provisions of the Act are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued it is unnecessary to set them forth here.

The bill further alleges that if the Company's directors pay the tax as they have declared their intention to do they will thereby diminish the assets of the Company and lessen the funds applicable to the payment of dividends on its capital stock and participating policies, including the stock and policy held by appellant; that it would be impossible to ascertain and measure the amount of damage and loss to appellant resulting therefrom; that said damage would be irreparable and incapable of ascertainment in an action at law (fol. 11); that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits not only by its shareholders, but also by its numerous policyholders; and that in such suits all the policyholders of the Company, including appellant, would or might be necessary and proper parties by reason of their interest in the net income of the Company, and that such suits would work irreparable injury to the business of the Company and to appellant and the Company's other stockholders and participating policyholders (fol. 12). The bill further alleges that this is a suit of a civil nature in equity and that the matter in dispute exceeds, exclusive of interest and costs, the sum

of Two thousand dollars, and arises under the Constitution and laws of the United States (fol. 12). The prayer of the bill is that it be adjudged that the taxing provisions of the said Act are unconstitutional; that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for; that the defendant Company be required to specifically perform the terms of its policy contracts with appellant and other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of the Company without subtraction or diminution by reason of anything contained in the Corporation Tax Act, and for general relief (fols. 12-13).

### THE CORPORATION TAX LAW.

The Act in question forms Section 38 of the new tariff law, being "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909. The provisions of the Act material to the present discussion are as follows:

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business

by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

*Second.* Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and neces-

sary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed. \* \* \*

*Third.* There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thou-

sand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe. \* \* \*

*Fifth.* All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon. \* \* \* All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June. \* \* \*

*Sixth.* When the assessment shall be made, as provided in this section, the re-

turns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

## **SPECIFICATION OF ERRORS RELIED UPON.**

### **I.**

That the Court below erred in sustaining the demurrer and dismissing the bills for want of equity.

Record in No. 751, fol. 28, Assignments of Error X, XI and XII;

Record in No. 752, fols. 27, 28, Assignments of Error XI, XII and XIII.

### **II.**

That the Court erred in not holding that Section 38 of the Act is void because as to State corporations it constitutes an interference with sovereign powers and functions of the States not surrendered to the general government and expressly reserved to the States by the 10th Amendment.

Record in No. 751, fol. 25, Assignments of Error I, II and III.

Record in No. 752, fols. 23, 24, Assignments of Error I, II and III.

### **III.**

That the Court erred in not holding that the taxes imposed or some portions thereof are direct taxes and that the provisions imposing the same are void because the taxes are not apportioned among the States.

Record in No. 751, fol. 26, Assignment of Errors IV;

Record in No. 752, fol. 25, Assignment of Errors IV.

#### IV.

That the Court erred in not holding that Congress could not tax the stocks and bonds of States and municipalities thereof, and in not sustaining the bill to that extent.

Record in No. 752, fol. 25, Assignment of Errors V.

#### V.

That the Court erred in not holding that said section of said Act is unconstitutional because the tax it imposes is arbitrary, non-uniform and unequal, and makes illegal discriminations and exemptions.

Record in No. 751, fols. 26, 27, Assignments of Error V, VI, VII and VIII.

Record in No. 752, fols. 25-27, Assignments of Error VI, VII, VIII and IX.

#### VI.

That the Court erred in not holding that the tax is unconstitutional so far as the same is imposed on the franchises or business of State railroads and other public service corporations.

Record in No. 751, fol. 25, Assignments of Error II and III.

### **PRELIMINARY POINT.**

**Equity has jurisdiction, at the instance of a stockholder, to restrain the threatened breach of trust on the part of directors in voluntarily paying and not resisting the collection of an unconstitutional tax.**

*Pollock v. Farmers Loan & Trust Co.*,  
157 U. S., 429, 553;  
*Dodge v. Woolsey*, 18 How., 331;  
*Hawes v. Oakland*, 104 U. S., 450.

It is unnecessary to argue this point at length in view of the careful consideration which the question received in the Income Tax Cases (*Pollock v. Farmers Loan & Trust Co.*). These suits are similar in nature and procedure to the *Pollock* case, which is believed to have settled the jurisdictional questions involved.

### **POINT I.**

**The tax is not an excise tax upon business or occupation, but is either**

- (a) A corporate franchise tax, or**
- (b) An income tax.**

The first thing to be determined is the exact nature of the tax. The Act describes it as "a special excise tax with respect to the carrying on or doing



business" by the corporations, joint stock companies and insurance companies on which it is imposed.

These words were taken almost verbatim from the opinion of this Court in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397, and it is matter of public record, in the Senate debates on the subject, that the *Spreckels* case was supposed to afford a precedent for the tax sought to be imposed.

See *e. g.* Congressional Record for June 16, 1909, p. 3450; *id.* for July 1, 1909, pp. 4069, 4077-8, 4079.

In the *Spreckels* case a tax had been imposed on a corporation carrying on the business of refining sugar, under an Act of Congress providing

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."

(Act of June 13, 1898, Section 27.)

This Court sustained the tax as an excise tax on business or occupation, saying (p. 411) :

"Clearly the tax is not imposed upon gross annual receipts as property; but only *in respect of the carrying on or doing the business* of refining sugar."

It seems to have been assumed when these words were inserted in the present Act that they carried with them the nature of the tax concerning which they were spoken. We believe it can readily be demonstrated that this assumption was erroneous, that the present tax differs fundamentally in its nature from the tax involved in the *Spreckels* case, and that it is not a tax on business or occupation.

1st. The tax is imposed only on artificial persons. Individuals and ordinary partnerships engaged in similar businesses are not taxed. The Act construed in the *Spreckels* case, on the contrary, applied to "every person, firm, corporation or company" carrying on the business specified.

How can a tax imposed on A and B and not on C and D, when all are carrying on the same kind of business, be said to be a tax on business or occupation?

2nd. The tax is measured by a percentage of the net income, not from business carried on, but from *all sources*. In the act construed in the *Spreckels* case, on the contrary, the tax was limited to income received in the particular businesses sought to be taxed. This difference would seem to be decisive against the claim that the tax is to be construed as a tax on the businesses in which the various artificial persons subject to its operation are engaged. The measure adopted does not vary reasonably with the value of such businesses. How can it be said that a tax is upon a business or occupation when it is levied upon a person without regard to the amount of business he does or where he does it, or whether his business is taxable or not and even when he ceases from business altogether provided he is in receipt of an income? The provisions of the Act which

extend the taxation over the entire net income of corporations, only a fraction of whose income is derived from business, and over the entire net income of corporations engaged wholly in foreign business, or not engaged in business at all (provided they happen to have an income from investments), and over the entire net income of corporations engaged in a non-taxable business like the exporting companies, we respectfully submit render it impossible to classify the present tax with occupation or business taxes.

3rd. No kind or kinds of business are specified. The tax falls indiscriminately on the income of all artificial persons (with certain enumerated exceptions not material to the present discussion) doing every conceivable kind of business. In the act construed in the *Spreckels* case, on the contrary, the tax was limited to certain specific businesses, viz., refining petroleum and refining sugar. The difference is fundamental. An essential distinction between a direct property tax and an excise is that the former is a tax upon property or income generally, imposed merely because of ownership, while an excise tax on business, privileges, acts or commodities, involves the selection of some particular business, privilege, act or commodity, to be taxed.

In *Maine v. Grand Trunk Ry. Co.*, 142 U. S., 217, the Court said, speaking of an excise tax (p. 227): "The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue *certain* callings, or to deal in *special* commodities, or to exercise *particular* franchises" (*Italics ours*).

In *Nicol v. Ames*, 173 U. S., 509, the Court said (p. 521):

“A tax upon the privilege of selling property at the Exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property*” (Italics ours).

This language is quoted with approval in *Fairbank v. United States*, 181 U. S., 283, 293.

In *Thomas v. United States*, 192 U. S., 363, the Court held that the stamp duty imposed by the War Revenue Act of 1898 on sales of shares of stock in corporations was an excise and not a direct tax. Chief Justice Fuller, speaking for the Court, said (pp. 370-371) :

“There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of *certain* commodities, privileges, *particular* business transactions, vocations, occupations and the like. \* \* \* The sale of stocks is a *particular* business transaction” (Italics ours).

In *Patton v. Brady*, 184 U. S., 608, the Court held that a tax on a particular article (viz, manufactured tobacco), imposed at a period intermediate the commencement of manufacture and the final consumption of the article, was an excise. Justice Brewer, discussing the nature of an excise as distinguished from a direct tax, said (pp. 617-18) :

“Cooley, in his work on Taxation, page 3, defines it as ‘an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue *certain* trades, or to deal in *certain* commodities.’ Bouvier and

Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost, operating as an indirect tax on the consumer, levied upon *certain specified* articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue *certain* trades and deal in *certain* commodities.' \* \* \* Counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such, but upon *certain kinds* of property, having reference to their origin and their intended use." (Italics ours).

In *Knowlton v. Moore*, 178 U. S., 41, Justice White said (p. 47) :

"They (*i. e.*, inheritance and legacy taxes in France) are included officially under the general denomination of indirect taxes for the reason that all inheritance and legacy taxes are considered as levied on the 'occasion of a *particular isolated act*.'" (Italics ours)

and on page 82 he refers to the decision in the *Income Tax Cases*, as follows:

"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the Court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax

imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned."

It must be concluded, therefore, that a tax upon all persons whatever, irrespective of their callings, measured by a percentage upon their income from all sources, would not be an excise tax on business, but would be essentially an income tax. If the tax be confined to artificial persons, excluding individuals and ordinary partnerships (as in the Act under consideration), it does not thereby become an excise tax upon business. The limitation which converts an income or property tax into an excise tax must be upon the *property* taxed, not upon the *owner* thereof. Such a tax limited to artificial persons either remains what it was before—an income tax—or else becomes a franchise tax. Calling it something else cannot alter its essential nature.

4th. That the tax cannot properly be construed as a tax on business or occupation is also shown by other features of the Act: e. g., it extends to corporations and joint stock associations engaged in the business of exporting, and requires them to pay a tax upon the net income derived from such business. Of course, Congress cannot tax the business of exporting as a business (Constitution, Art. I, Sec. 9, subdiv. 5; *Brown v. Maryland*, 12 Wheat., 419; *Fairbank v. United States*, 181 U. S., 283) and the inclusion of such a provision in the present Act adds to the difficulty of classifying the tax imposed with business or occupation taxes. Again, the tax

is imposed upon corporations and joint stock companies wheresoever they are engaged in business, and requires them to pay a tax upon income derived, not merely from business done in this country, but also from that done in foreign countries. This follows from the generality of the language employed and the provision for deducting taxes paid by such corporations and joint stock companies in foreign countries "as a condition to carrying on business therein." It can hardly be claimed that Congress has power to tax a business as such when carried on beyond the jurisdiction of the United States. As said by Justice Field in *State Tax on Foreign-Held Bonds*, 15 Wall., 300, 319:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

If Congress cannot tax foreign business, this feature of the present tax also stands in the way of its classification with occupation and business taxes.

It is unnecessary to argue that the nature of the tax does not depend on what Congress has seen fit to label it.

As was pointed out by the Court in the *Pollock* case (157 U. S., pp. 580-583): "The name of the tax is unimportant;" \* \* \* "it is the substance and not the form which controls;" \* \* \* the limitations of the Constitution cannot be "frittered away" by calling a tax indirect when it is in fact direct. And again in *Galveston, &c. Ry. Co. v*

*Texas*, 210 U. S., 217, 227, the Court denied that "The legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

## POINT II.

**If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the states not surrendered to the general government and expressly reserved to the states by the Tenth Amendment.**

As already shown (Point I, *supra*) the tax is not a tax on business or occupation. It follows that (if not an income tax) it is to be construed as a franchise tax, imposed in the case of domestic corporations and joint stock associations upon the franchise to do business in their respective capacities, and in the case of foreign corporations and associations on the privilege of doing business in their respective capacities within the territorial jurisdiction.

Home Ins. Co. *v.* New York, 134 U. S., 594;  
Society for Savings *v.* Coite, 6 Wall., 594;  
Provident Institution *v.* Mass., *ibid.*, 611;



Maine v. Grand Trunk Ry. Co., 142  
U. S., 217;

Horn Silver Mining Co. v. New York,  
143 U. S., 305;

People *ex rel.* v. Knight, 174 N. Y.,  
475.

In the *Home Insurance Company* case this Court held (as stated in the headnote) that

“A tax which is imposed by a State statute upon the ‘corporate franchise or business’ of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity.”

In *Society for Savings v. Coite and Provident Institution v. Mass.* (*supra*) it was held that a tax on savings banks measured by a percentage upon their deposits was a corporate franchise tax.

In *Maine v. Grand Trunk Ry. Co.* (*supra*) it was held that a tax on a foreign corporation measured by a proportion of its gross receipts within the State was “an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State” (p. 227). *Horn Silver Mining Co. v. New York* (*supra*) is to the same general effect.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax. Apparently the only joint stock companies taxed are

such as have a statutory origin and enjoy franchises from the State. The language of the act is:

“Every corporation, joint stock company or association \* \* \* and every insurance company \* \* \* *organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or \* \* \* under the laws of any foreign country.*”

The words which we have italicized apparently qualify the words “joint stock company or association” as well as the words “corporation” and “insurance company”, and seem to exclude from the operation of the act such joint companies, if any there now be, as are merely common law partnerships. That many joint stock associations are artificial entities and possess and exercise legislative franchises substantially identical with those possessed and exercised by corporations is well established. (*Liverpool Insurance Co. vs. Massachusetts*, 10 Wall., 566; *People vs. Wemple*, 117 N. Y., 136; *Hibbs vs. Brown*, 190 N. Y., 167; *Adams Ex. Co. vs. State*, 55 Ohio St., 69; *Briar Hill Coal & Iron Co. vs. Atlas Works*, 146 Pa., 290; *Oak Ridge Coal Co. vs. Rogers*, 108 Pa., 147; *Attorney General vs. Mercantile Marine Insurance Co.*, 121 Mass., 524.)

Assuming then that this is the real nature of the tax, *i. e.*, that it is a tax upon franchises or the privilege of doing business in corporate or joint stock form is it within the power of Congress to impose?

Unquestionably Congress may tax corporations organized under Federal law upon their franchises; any sovereignty may so tax its creatures; but how about corporations chartered by the States and do-

ing only an intra-state business? A State confers on John Doe and his associates the privilege or franchise of doing business in a corporate capacity. Can Congress impose a tax on the exercise of that privilege or franchise? The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create. (*McCulloch v. Maryland*, 4 Wheaton, 316.) If Congress can impose a tax of one per cent., it can impose a tax of ten per cent. or fifty per cent., and thus impair or destroy altogether the value of corporate charters for business purposes. Does Congress possess such a power?

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. The United States is a Government of enumerated powers. The Constitution nowhere expressly confers upon Congress the right to grant corporate charters, and it is well settled that this right exists only in the limited class of cases where the granting of charters becomes incidental to some power expressly conferred. On the other hand, the right of the separate States to grant charters of incorporation is unquestionable. They had that right before the Union was formed and never surrendered it. In the Constitutional Convention of 1787, Mr. Madison twice moved that Congress be given power to grant charters of incorporation in certain cases, but the motions were not adopted.

(See Elliot's Debates on the Federal Constitution, 2nd Ed., Vol. V., pp. 440, 543.)

This Court has frequently recognized the plenary power of the States to grant and control the exer-

cise of corporate franchises (See *e. g.*, *Home Ins. Co. v. New York*, 134 U. S., 594, 600-601; *Horn Silver Mining Co. v. New York*, 143 *id.* 305, 313), and long ago said of it: "This power is incident to sovereignty." (*Briscoe v. Bank of Kentucky*, 11 Peters, 257, 317.)

The power to grant the franchise to do business in a corporate capacity being therefore inherent in the sovereignty of the States, it follows that a tax imposed by Congress upon the exercise of the franchise will constitute an interference with the power.

This court has said, and many times repeated in substance, that the National Government "cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action."

*Railroad Company v. Peniston*, 18 Wall., 5, 30.

Thus it has been held that Congress cannot tax the obligations of indebtedness of a State (*Mercantile Bank v. New York*, 121 U. S. 138, 162); that Congress cannot tax a municipal corporation (being a portion of the sovereign power of the State) upon its municipal revenues (*U. S. v. Railroad Co.*, 17 Wall., 322); that Congress cannot impose a tax upon the salary of a judicial officer of a State (*Collector v. Day*, 11 Wall., 113); that Congress cannot tax a bond given in pursuance of a State law to secure a liquor license (*Ambrosini v. United States*, 187 U. S., 1). A writer of high authority on Constitutional Law has said:

"There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure exist-

ence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the National Legislature as if the interference were direct and extreme."

Cooley, Constitutional Limitations, 7th Ed., p. 684 (quoting from *Pi-field v. Close*, 15 Mich., 505, 509.)

In his dissenting opinion in the *Peniston* case *supra* (quoted with approval by the present Chief Justice in 162 U. S., p. 122), Justice Bradley said:

"It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General Government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence."

The precise question whether Congress can tax the corporate franchises of a State corporation has not been directly brought before this Court, because Congress has not heretofore attempted anything of the sort. The converse of the question, *i. e.*, whether a State can tax corporate franchises granted by Congress, has, however, been directly passed upon. In *California v. Central Pacific R. R. Co.*, 127 U. S., 1, the question was squarely presented. That was an action by the State of California to recover a tax assessed upon all the property and franchises of the defendant. Some of the defendant's franchises had been granted by Congress. The Court held the assessment void because these franchises were included. Justice Bradley, speaking for a unanimous court, discusses the nature and origin of franchises, concluding that a

franchise is "a right, privilege or power of public concern" existing and exercised by legislative authority. After enumerating various kinds of franchises, the opinion continues (p. 41) :

"No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* \* \* \* In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 'The power to tax involves the power to destroy.' \* \* \* It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

This case is squarely in point, unless the rule there enunciated does not work both ways,—unless Congress can tax the franchises of a State railroad company but a State cannot tax the similar franchises of a railroad company chartered by Congress. Such a view would run counter to the trend of decisions in this court during its entire existence. In the early case of *Chisholm v. Georgia*, 2 Dall., 419, Justice Iredell said (p. 435) :

"Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider

to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them; of course the part not surrendered must remain as it did before."

In *The Collector v. Day*, 11 Wall., 113, the Court said (p. 124) :

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

and again (p. 126) :

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality."

These views have been reiterated time and again in later cases. Moreover, they have been consistently applied. In *Weston v. City of Charleston*, 2 Peters, 449, it was established that a State could not tax the obligations of the United States, because such a tax operated upon the power of the

Federal government to borrow money. In *Mercantile Bank v. New York*, 121 U. S., 138, 162, the converse was held, *i. e.* that Congress could not tax the obligations of a State for the same reason. In *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, it was held that a State could not tax the emoluments of an official of the United States. In *Collector v. Day*, 11 Wall., 113, the converse was held. As a State cannot impose a tax on the property or revenues of the United States (*Van Brocklin v. Tennessee*, 117 U. S., 151), so Congress cannot tax the property or revenues of a State or a municipality thereof (*United States v. Railroad Company*, 17 Wall., 322).

It will doubtless be urged that the tax in *California v. Central Pacific Railroad* was unconstitutional, not merely because it was imposed upon a franchise granted by the General Government, but because the Railroad Company was a governmental agency and performed governmental functions. But the same thing is true of a State public service corporation (like the Coney Island and Brooklyn Railroad Company, defendant in No. 751). To provide means of transit and intercommunication for its citizens and troops has commonly been regarded as a governmental function of a State. In the exercise of that function Rome built her roads and New York her Erie canal. A State may exercise that function without private co-operation, or it may (and in this age of railways usually does) exercise it by conferring appropriate corporate franchises on individuals, endowing the corporation so formed with the governmental power of eminent domain, and leaving it to do the rest, subject to State supervision.

We submit, however, that the true test (and the test applied in the case cited) is found in *the nature*



*of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered.* In the words of the Court, "The power conferred emanates from and is a portion of, the power of the government that confers it." The granting of a charter to an insurance company or other private corporation is as much an emanation of governmental power as is the granting of a charter to a national bank, and the possession or exercise of either is the possession or exercise of governmental power. In other words, *the exercise of the power to grant a charter of incorporation is always a strictly governmental function, whether the corporation so chartered is expected to act as a governmental agency or not.* It is a function peculiar to government or sovereignty and incapable of exercise by any one else. It is a branch of, or incidental to the law-making power (1 Morawetz, Corporations, Sec. 8). A tax, therefore, on the franchise, or the exercise of the franchise, constitutes an interference with the exercise of a governmental function, irrespective of the character of the corporation which pays the tax.

The rule forbidding taxation by the States of patent rights or copyrights granted by the General Government (*People ex rel Edison &c. Co. v. Assessors*, 156 N. Y., 417; *People ex rel v. Roberts*, 159 N. Y., 70; *In Re Sheffield*, 64 Fed. Rep., 833; *Commonwealth v. Westinghouse &c. Co.*, 151 Pa., 265; *Webber v. Virginia*, 103 U. S., 344) would seem to rest on the same reason, though it has not always been clearly recognized by the State Courts. The granting of a patent is an emanation of governmental power and the exercise of a governmental function, and therefore immune from State inter-

ference, irrespective of the nature or intended use of the patent itself.

The principle for which we are contending is well summarized in

Wisconsin Railroad Co. v. Price  
County, 133 U. S., 496, 504,

where, speaking of the lack of power in a State to tax property of the United States, the Court says that the exemption

“is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.”

That corporate franchises granted by a State are beyond the taxing power of Congress follows from another line of reasoning. Chief Justice Marshall, in words often repeated by this Court, defined the limitations of the taxing power as follows: (*Weston v. City Council of Charleston*, 2 Peters 449, 467).

“All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission.”

Applying the test here proposed,—can it be contended for a moment that the corporate franchise of a state corporation exists “by authority” of the General Government, or is “introduced by its permission”? Congress did not grant the franchise, and cannot amend or revoke it, or regulate

its exercise when not employed in inter-state commerce. The Federal Government cannot maintain *quo warranto* proceedings to forfeit a state franchise or oust the possessor thereof. All these powers belong exclusively to the State. Congress undoubtedly can impose on artificial persons the same taxes that it can impose on natural persons. It can tax the property and business of A. B. C. & Co., a partnership engaged in the business of sugar refining, and its power to impose those taxes is not diminished if A. B. & C. choose to incorporate as the A. B. C. Company. A tax on the corporate franchise, however, goes further and seeks to reach something new,—something which in the case of individuals has no existence at all,—which comes into being only by the exercise of the sovereign power of a State,—which “emanates from and is a portion of, the power of the government that confers it,” (127 U. S. 41), and exists during the pleasure of that government. In other words such a tax seeks to reach the corporate life, a thing which Congress did not give and cannot take away, unless by the destructive power of taxation.

We proceed to examine briefly certain cases asserted to be at variance with the views above expressed.

*Pacific Insurance Company v. Soule*, 7 Wall. 433, is claimed to be an authority for the tax on insurance companies. That case upheld a Federal tax on an insurance company measured by a percentage of its premium receipts. The tax was described as “upon the *business* of an insurance company” and was sustained on the ground that it was an excise or duty and not a direct tax. That it was a tax on business, whereas the present tax

is not, will be clear from a brief comparison of the two Acts. In the *Soule* case the Act applied not only to "every insurance company" but also to "every association or individual engaged in the business of insurance." (13 U. S. Statutes at Large 276.) The present Act applies only to artificial persons. Moreover, large classes of artificial persons are expressly exempted. For example, fraternal beneficiary societies, orders and associations operating under the lodge system, which corporations, as is well known, do a very large part of the insurance business of the country. In the *Soule* case the income taxed was income received from the insurance business. The present Act taxes income "from all sources." In the *Soule* case a particular business was selected for taxation. The present Act taxes all artificial persons indiscriminately, regardless of the kind of business transacted. It is clear, therefore (for the reasons discussed in Point I *supra*), that the tax involved in the *Soule* case was of a different nature from the tax now before the Court and that the case affords no precedent for this tax.

*Veazie Bank v. Fenno*, 8 Wall., 533 (which upheld the statute taxing out of existence the circulation of the State banks), has been asserted to sustain the right of Congress to levy a tax upon a franchise or privilege granted by a State. It is true that in that case the eminent counsel for the bank (Messrs. Reverdy Johnson and Caleb Cushing) argued unsuccessfully "that the act imposing the tax impaired a franchise granted by the State, and that Congress had no power to pass any law which could do that" (See 8 Wall., p. 535), and that two justices dissented on that ground. The

conclusive answer to this argument was, however, that the power of the States to grant the particular right or privilege in question was subordinate to powers expressly conferred on Congress by the Constitution; that Congress was given power under the Constitution to provide a currency for the whole country, and the Act in question was legislation appropriate to that end. The case does not hold that Congress has any general power to tax franchises or privileges granted by a State. The decision was expressly put on other grounds, and the remarks of the Chief Justice on the taxation of franchises (found at p. 547) are merely dicta.

*Knowlton v. Moore*, 178 U. S., 41 (the Federal Inheritance Tax case), has also been asserted to be an authority for the right of Congress to tax a privilege granted by a State. It is true that in that case the Court discussed and overruled the contention that Congress cannot impose an inheritance tax because inheritances are regulated by State law. The Court, however, concluded, after an exhaustive examination of the subject, that the tax did not fall on any privilege from the State. An inheritance tax falls on the transmission or transfer. As Mr. Justice White, writing for the Court, said (p. 59):

"The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

The transmission or transfer is not a privilege granted by a State, but necessarily follows and results from the fact of death. A man dies and his property perforce passes from him. That is the transmission. The State does not originate it, but merely prescribes the channels in which it shall flow. This right of regulation is not the subject of the tax. The tax would be due, like the tax upheld in the *License Tax Cases* (5 Wall., 462), if there was no regulation whatever.

*South Carolina v. United States*, 199 U. S., 437 (the South Carolina Dispensary case), has been asserted to be an authority for the right of Congress to tax the exercise of powers or functions by a State. The powers and functions in question, however, were not of a governmental character. Moreover, the case does not touch at all the question of the right of Congress to tax franchises granted by a State. The tax which was upheld was a tax upon the business of selling liquor. The right to sell liquor is not a franchise granted by a State any more than the right to sell boots, though the State in the exercise of the police power may regulate the business or even take it over altogether and conduct it through agents of the State. South Carolina had done this, and the question in the case was as to the right to tax a State agency. The question of the right to tax a franchise or privilege from the State was not involved. The Court held that the State could not, by taking over a private business, deprive the Federal Government of a right of taxation which had always existed, pointing out that otherwise "it would be within the competency of the States practically to destroy the efficiency of the National Government."

This Court in both the cases last cited lays much

stress on the historical argument, *i. e.*, that the power of Congress to impose the taxes in question had been conceded from the foundation of the Government and frequently exercised. The tax now before the Court, on the contrary, is an innovation of the year 1909.

We are not contending here (as were appellants in the Inheritance Tax case and the South Carolina Dispensary case), in favor of any right or power of a State to narrow the field of Federal taxation or withdraw from the taxing power of Congress any subject matter over which that power has ever been exercised. On the contrary we are resisting an attempted encroachment by Congress on an entirely new field, created by and heretofore reserved exclusively to the separate states. Congress can tax a property and business owned by individuals. It can tax the same property and business when owned by a corporation. The act of the State in clothing the individuals with corporate franchises withdraws no source of Federal revenue. Does it on the contrary create a new subject matter for taxation by the General Government? That is the proposition involved in the claim of a right in Congress to tax corporate franchises granted by a State. We submit that there is no ground for such a claim, either in reason or in precedent.

#### **The Tax Cannot Be Sustained as a Tax on Franchises as Property.**

It may be urged, in reliance on certain dicta in *Veazie Bank v. Fenno*, 8 Wall., 533, 547, that the tax is imposed on franchises, not as privileges from the State, but as *property*.

We do not think the Act is open to that construction. There is no provision for ascertaining the value of the franchises as property, either by appraisement or otherwise.

Even if the Act were to be so construed, however, appellees would be in no better position, because :

(a) The fact that a tax is on property does not render it constitutional if it nevertheless involves an interference with sovereign powers or instrumentalities of a State. The taxes involved in *The Collector v. Day*, 11 Wall., 113, and *U. S. v. Railroad Co.*, 17 Wall., 322, were property taxes, but that fact did not save them.

(b) If the tax is on franchises as property it is a tax imposed on real or personal property, and is void under Article I, Sections 2 and 9, of the Constitution, as being a direct tax not apportioned according to population.

*Pollock v. Farmers' Loan & Trust Co.*,  
157 U. S., 429.

On Rehearing, 158 U. S., 601.

**The Principle Menaced by the Claim of a Right in Congress To Tax the Franchises of State Corporations, and the Practical Consequences if Such a Claim Be Upheld.**

The amount of the present tax is not large when compared with the aggregate assets of the artificial persons on which it is laid. The principle involved, however, is fundamental and vital. It touches the right of each State under the compact evidenced by the Federal Constitution to manage its internal affairs free from compulsion or interference by the other States.



In some parts of the country the anti-corporation feeling runs high. Many men, both in Congress and out, if given their way would tax the larger corporations out of existence. If this Act is upheld in principle the way is open whenever these men can secure a majority in Congress. An increase in the tax rate is all that would be necessary. Make the rate ten per cent. or twenty per cent. instead of one per cent. and the thing is accomplished.

New York may deem it good policy to encourage the carrying on of industry in a corporate form. Texas may take a different view and conclude that the solution of the Trust problem lies in suppressing certain classes of corporations altogether. If the principle of this Act is upheld it will be within the power of Texas and her associates in Congress to impose their views on New York and make it impossible for her domestic industries to be carried on profitably in a corporate form. The possibility of so impressing the will of one State or group of States upon another State with respect to her internal affairs is the very thing which the founders of the Government sought most carefully to avoid. Had it been supposed that the grant of taxing powers to the General Government involved such a curtailment of State independence it is doubtful, to say the least, whether enough States would have consented to ratify the Constitution.

### POINT III.

**If the tax be construed as an income tax it is unconstitutional (a) because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the states according to population; and (b) because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the states. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.**

The Act provides

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually a [*special excise*] tax [*with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company,*] equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," etc.

Strike from the Act the words which we have bracketed and it becomes clearly an income tax (if it is not a corporate franchise tax). Can the addition of those words be said to change the nature of the tax? They are merely words of description or characterization, in no wise affecting any of the

substantive features of the tax. And as already seen (Point I *supra*), the nature of the tax depends upon its substantive features—not on what the legislature has seen fit to call it. “It is the substance and not the form which controls.” (157 U. S., 581.)

It will be illuminating to compare the tax with the corresponding features of the act declared unconstitutional in the Pollock case. Section 32 of that act (28 Stat., 509, 556, c. 349,) provided

“That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all \* \* \* corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships.”

Comparing the provisions just quoted with the Act now under consideration it will be seen that while they differ in phraseology the only difference in substance is that the Act of 1894 imposed a tax of two per centum “on the net profits or income” of corporations, while the present tax is “equivalent to one per centum upon the entire net income over and above five thousand dollars.” The fatal characteristic of the Act of 1894 as found in the Pollock case was that it imposed without apportionment a tax on persons “solely because of their general ownership of property.” (Knowlton *vs.* Moore, 178 U. S., 41, 82.) That characteristic pervades every feature of the present Act and is intensified by the addition of the word “entire” as above.

We assume that if this court construes the tax as an income tax it will feel itself constrained to follow the decision in the Income Tax cases. (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429; 158 U. S., 601.) We deem it unnecessary, therefore, to discuss the considerations on which that decision was based. No case ever received more thorough or exhaustive consideration. It has been frequently cited as authority in later decisions of this court and has been acquiesced in by the country at large. The method of providing for a valid Federal income tax which it pointed out (*viz.*: by constitutional amendment) is actually being pursued. Such a constitutional amendment has been proposed by Congress (See Joint Resolution of Congress, p. 185 of Statutes of 1909) and is now before the State legislatures for ratification. Under these circumstances the questions involved in the Income Tax cases may well be considered as definitely and finally settled.

It only remains to point out that the corporations involved in the cases in which this brief is filed (Nos. 751 and 752) derive income from sources which bring them squarely within the decision in the *Pollock* case. The Home Life Insurance Company (Appellee in No. 752) has many millions of dollars invested in real and personal property and in Government, State and municipal securities, and derives a large income from such investments.

See Record, p. 2, fol. 3.

The Coney Island and Brooklyn Railroad Company (Appellee in No. 751) derives substantially its entire income from the use of real and personal

property, and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

See Record, p. 5, fols. 9, 10, Laws of New York 1909, Chap. 62, Sec. 2.

That the inclusion of these objects in the taxing scheme of 1894 rendered the whole scheme void was one of the points decided in the Pollock case. The court considered that the scheme must be regarded as a whole and that the provision for a tax on the income from real and personal property formed a vital part of it. The same reasoning, we submit, applies to the present Act. This Act contemplates a tax upon the entire net income of corporations and joint stock associations derived from all sources. The amount of income derived by corporations—notably insurance companies—from real estate and invested personal property is very large, and the taxation of this income is as vital a part of the present scheme as it was of that of 1894. If this were deducted a large part of the anticipated revenue would be eliminated and the tax would cease to be upon the entire net income as contemplated by Congress. A tax upon net income received from all sources except from invested capital and surplus is very different in operation and effect from a tax upon entire net income from all sources.

#### POINT IV.

**The tax ordained by the Act in question is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.**

That Congress may impose an excise tax upon the carrying on of a particular business is, of course, well established. Of this character was the excise imposed upon the insurance business and upheld in *Pacific Insurance Co. vs. Soule*, 7 Wall., 433, and that imposed upon the refining of sugar and petroleum and upheld in *Spreckels Sugar Refining Co. vs. McClain*, 192 U. S., 397. The taxes considered in both of those cases, however, were exacted from all persons, co-partnerships and corporations engaged in the particular business excised and there was, therefore, no element of arbitrariness or inequality contained in the Acts imposing them. In addition to these Congress has at various times passed numerous other Acts imposing excise taxes upon selected and classified occupations, callings or privileges, none of which, however, bore any resemblance to the present act. Here, for the first time, we have a tax claimed to be an excise which is levied upon every conceivable business, occupation or calling in which any individual, co-partnership, joint stock association or corporation may engage, but limited to those only

who carry on such business in joint stock or corporate form. The result is to impose upon one competitor in a particular line of business a burden that is not imposed upon another engaged in the same line, with the ultimate effect, of compelling the discontinuance of the business discriminated against which could only be carried on under such circumstances at a ruinous disadvantage.

Undoubtedly Congress may classify the objects of taxation, but such a classification must be reasonable and must be based upon characteristics which differentiate persons and objects within the class from those who are omitted and it must include all who are within the principle upon which it is based. No classification, we submit, could be more unreasonable, arbitrary or vicious than one which includes, for the purpose of taxation, some members of a class engaged in a competitive business and excludes others of the same class. The result of such a classification must be to favor some at the expense of others and violate the principle of equality which lies at the basis of all just legislation. In *Coolcy on Taxation*, at page 259, it is well said:

“Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax laid exclusively on merchants’ goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who

followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of money were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

If Congress may impose an exclusive tax upon corporations and joint stock associations with respect to the carrying on of a business which others may engage in upon equal terms, why may it not impose a like tax upon single men, women, foreign born citizens, or red-haired men? If the principle of arbitrary selection be once allowed, who can set bounds to its exercise?

And not only are corporations and joint stock associations arbitrarily selected for taxation, but some corporations are as arbitrarily exempted. Thus



the Act exempts fraternal benefit societies, orders or associations operating under the lodge system, and domestic building and loan associations.

The enormous business done by the last-named associations is well known. Their profits are greater than those of the average bank, trust company or savings institution. They are in no sense public, charitable, religious or benevolent associations. They engage in business solely for the profit of their members and they compete directly with savings banks, trust companies and insurance companies in the loaning of money. Why should the latter be taxed and they exempted? What is there in their business that justifies a discrimination in their favor as against savings banks and mutual insurance companies? Referring to the exemption of these associations in the Income Tax Act of 1894, Mr. Justice Field in the Pollock case said (p. 598) :

"The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. \* \* \* The census report submitted to congress by the President, May 1, 1894, shows that their property in the United States amounts to over \$628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress, and be freed from their just, equal and proportionate share of taxation, when others engaged under different names, in similar business, are subjected to taxation by this law?"

So with fraternal benefit associations doing business under the lodge system. How do they differ in principle from mutual life insurance associations? Both exist for the benefit of their members and neither is more benevolent or beneficial to society than the other. They are in constant competition everywhere for business and yet one is taxed on the business it does and the other exempted. To quote again from the opinion of Mr. Justice Field in the Pollock case (p. 595) :

“Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. (Citing cases.) Cooley in his treatise on Taxation (2d Ed., 215), justly observes that ‘It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.’”

Nor do the unequal, arbitrary and discriminating features of the Taxing Act end here or affect corporations and joint stock associations alone as a class, but they are also to be found within the selected class itself. We call attention to three of them that directly affect the defendant corporations in these cases.

1. The tax, although purporting to be a tax on the doing of business is not limited to the in-

come derived from the business done, but is imposed upon, or calculated according to, the entire net income over and above Five thousand dollars, received by the owner, from all sources whatsoever. The result is that if one corporation derives a net income of \$100,000 wholly from a business carried on by it and another carrying on a business of the same kind and making an equal profit, receives an additional income of \$100,000 from investments which may be in State or United States bonds, exempt from taxation, one is taxed one thousand dollars and the other two thousand for the exercise of exactly similar privileges with exactly similar results.

Of the victims of this discrimination, defendant Home Life Insurance Company is one. It has over \$16,000,000 invested in interest bearing securities, upwards of \$1,100,000 of which consists of undivided profits; and these investments, to the extent of several hundred thousand dollars are in State, Federal or municipal securities (Record, p. 2, fol. 3). If any part of the interest derived from these investments can be said to be income from business that cannot be said of the interest from the \$1,100,000 of undivided profits, and yet the company is required to pay the same tax upon this latter as upon the earnings from its business.

2. The Act provides for a deduction from the gross income received by the corporation or joint stock association taxed, on account of interest paid on its bonded or other indebtedness, up to the amount of its capital stock, and no more. The result is, that if one corporation has \$1,000,000 of capital and \$1,000,000 of indebtedness, upon the latter of which it pays interest at the rate of four and one-half per cent., and makes in a given year

a profit over operating expenses of \$50,000, it has no tax to pay because it is allowed a deduction on account of the \$45,000 paid as interest on its indebtedness, while another corporation doing the same amount of business and making the same profit above operating expenses is compelled to pay tax on \$45,000 of its gross income if it happens to have a capital stock of only one hundred thousand and an indebtedness of eleven hundred thousand upon which it pays the same rate of interest. In other words, a corporation in the situation last supposed is compelled to pay a tax not upon its net income—for it has none—but upon the interest of what it owes. This feature of the Act operates directly against defendant The Coney Island and Brooklyn Railroad Company. That Company has a capital of \$2,983,900 and an indebtedness of \$3,700,000 (Record, p. 3, fol. 5), making a difference of \$716,100. On its indebtedness it pays interest at the rate of four per cent., which on \$716,100 amounts to \$28,644. It is required by the Act to pay a tax on its total net income, and on this \$28,644 besides.

3. The Act requires corporations and joint stock associations to pay a tax on their *entire* net income received from all sources and so compels a corporation or joint stock association doing business both here and abroad to pay a tax upon the income of its foreign business for the privilege of doing its business here, notwithstanding that its domestic business may be less than five per cent. of its total business. That the effect of this is a discrimination against the larger life and fire insurance companies is apparent. These companies, as is well known, do a world business. In the

United States and its dependencies they compete everywhere with the foreign insurance companies. The latter, however, by the terms of the Act are only required to pay a tax on their net income derived from the business they do in this country, while the domestic companies, for the privilege of doing the same business, are compelled to pay a tax on their foreign business, which in some cases may be so large as to make it impossible for them to compete successfully here with their foreign rivals.

In *People vs. Mensching*, 187 N. Y., 8, the New York Court of Appeals had before it an Act imposing a tax on transfers of stock of domestic and foreign corporations calculated at the rate of two cents "on each share of \$100 of face value or fraction thereof". The Act was held unconstitutional because the tax imposed did not operate alike on all stock, but, without any basis for classification, bore heavily on some stock and lightly on other stock. The Court said (pp. 18, 21):

"While the legislature has wide latitude in classification its power in that regard is not without limitation. \* \* \* While the state can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others. or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of

reason for it. \* \* \* Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' (Citing cases.) By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest disregard of justice and principle. \* \* \* This is not classification, but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some, and lets others go. The rule governing the subject as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection'."

If these various arbitrary selections and discriminations are permissible, what is to hinder a majority of Congress from destroying any or all

State corporations, or any or all State franchises, at its mere will or whim? And if this can be done, what do constitutional guaranties amount to and what is to become of the reserve rights of the States? We earnestly protest that Congress has no such arbitrary power; that the existence of such a power would be in conflict with the fundamental principles upon which our government was established; that the first ten amendments to the Constitution were adopted for the very purpose of safeguarding the States against the attempted exercise of such a power, and that the provisions of the Fifth Amendment declaring that "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation," furnish ample protection against its attempted exercise in a case like the present.

Hamilton, writing for the *Continentalist*, said:

"The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue." (1 Hamilton's Works, Edition 1885, 270.)

Speaking upon the same subject, Mr. Justice Field, in the Pollock case, said (p. 599):

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax. This

inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress."

In Dillon on Municipal Corporations at Section 736, it is said:

"Equality, indeed, so far as practicable, is inherent in the very idea of a tax, as distinguished from arbitrary exaction."

At Section 737, it is further said:

"Taxation \* \* \* implies that the imposition shall be upon some system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed."

In Desty on Taxation at Section 10, it is said:

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. \* \* \* Where property is taken from the citizen by the sovereign will and appropriated without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions are exacted from such constituent members of the same community generally as own the same kind of property. \* \* \* A tax may be a capitation or a property tax, direct or indirect, *ad valorem* or specific, and though it may not be universal, yet it must be general and uniform."



In *People vs. Salem*, 20 Mich., 452, the Supreme Court of Michigan held a statute invalid, as not within the taxing power, irrespective of any constitutional limitations. In discussing the subject, the Court said (Cooley, J., p. 473) :

"It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. \* \* \* I understand that, in order to render valid a burden imposed by the Legislature under an exercise of the power of taxation, the following requisites must appear. \* \* \* 2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. \* \* \* Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. \* \* \* The principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action."

In *State vs. Township of Readington*, 36 N. J. L., 66, 70, Depue, J. (afterwards Chief Justice), said :

"A tax upon the persons or property of A, B and C, individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation."

In *State vs. Mayor of Newark*, 37 N. J. L., 415, 421, Beasley, C. J., said :

"I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation, is not a limited right. \* \* \* If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property, does not exist."

In *Durach's Appeal*, 62 Pa. St., 491, 494. Sharswood, J., said :

"There is no limitation of these powers" (*i. e.*, the power of taxation by municipal governments) "expressed in the constitution of Pennsylvania as there is in the constitutions of some of our

sister States; but, nevertheless, there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use without making compensation, and a special tax levied upon an individual, or upon particular individuals, would infringe this restriction."

As is well understood, the Due Process clause of the Fifth Amendment is an adaptation of the provisions of Magna Charta guaranteeing Englishmen against the deprivation of life, liberty or property except by the judgment of their peers and the law of the land.

"Due Process of Law" and "The Law of the Land," therefore, mean the same thing in constitutional law, and as remarked in *Bank of Columbia vs. Okely*, 4 Wheat., 235, 244:

"After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the *arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*" (Italics ours.)

In *State vs. Ashbrook*, 154 Mo., 375, it is said that the term "Due Process of Law" as construed by the Supreme Court of Missouri and all other courts of the land means "The Law of the Land," and that "*These words when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances.*" (Italics ours.)

The term Due Process of Law is also to be found in the Fourteenth Amendment and Mr. Justice Field speaking of it in that connection in the *Santa Clara Tax case*, 9 Sawy., 170, 187, said :

“The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation levelled against special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbances in society, of more insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law—‘Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation*—nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation*.’ No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation, without due process of law, is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws.”

In *Loan Ass'n v. Topeka*, 20 Wall., 655, 663, the Court said :

“Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited.

\* \* \* The power to tax is, therefore, the

strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland*, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

In *Hurtado v. People of California*, 110 U. S., 517, 534, it is said:

"We are to construe this phrase [due process of law] in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. \* \* \* Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest se-

curity for which resides in the right of the people to make their own laws, and alter them at their pleasure. \* \* \* But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public

agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In *Barbier v. Connolly*, 113 U. S., 27, 31, it is said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no *arbitrary* deprivation of life or liberty, or *arbitrary spoliation of property*, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.*" (Italics ours.)

In *Re Kemmler*, 136 U. S., 436, 448 (1889), it is said:

"In *Hurtado v. California*, 110 U. S. 516, 534, it is pointed out by Mr. Justice Matthews, speaking for the court, that the words 'due process of law,' as used in the Fifth Amendment, cannot be regarded as superfluous, and held to include the matters specifically enumerated in that article, and that when the same phrase was employed in the Fourteenth Amendment it was used in

the same sense and with no greater extent. As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights.*" (Italics ours.)

In *Leeper vs. Texas*, 139 U. S., 462, 468, it is said that due process of law is *secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.* (Italics ours.)

In *Giozza v. Tiernan*, 148 U. S., 657, 662, it is said that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property and secures equal protection to all under like circumstances in the enjoyment of their rights, *and that due process of law within the meaning of the amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.*

The definition of "Due Process of Law" as given



in the last mentioned case is repeated in *Duncan v. State*, 152 U. S., 377.

In *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S., 150, 154, 159, it is said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. (Citing cases.) The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

\* \* \* \* \*

"Arbitrary selection can never be justified

by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.* (Italics ours.)

## POINT V.

**Whatever view may be taken of the Act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of State railroads or other public service corporations, because an interference with State agencies or instrumentalities.**

The franchises of intra-state railroad corporations (like appellee, The Coney Island and Brooklyn Railroad Company), are conferred by a State for public purposes. These corporations are formed, in part at least, for the purpose of aiding the State in the discharge of a governmental function; viz., to provide means of transit and intercommunication for its citizens and troops. Their business is of a public character, subject to regulation by the State in the public interest and not to be abandoned without the State's consent. They are controlled or are controllable in all their operations by the State, which has the right, not infrequently exercised, of fixing the rates they shall charge and prescribing in detail the service they shall render. In exercising the power of eminent domain, they exercise a power and perform a function of the State which charters them. The exercise of this power is part of their business. With some of them it doubtless constituted a part of the business transacted during the year ending December 31, 1909, which is what the Act purports to tax.

Conceding the right of the General Government to tax the *property* of these corporations as dis-

tinguished from their franchises or business (*Railroad Company v. Peniston*, 18 Wall., 5), it is not perceived how Congress can tax their franchises or business without violating the well-established principle that neither the General Government nor a State can tax the agencies or instrumentalities of the other.

The South Carolina Dispensary case (*South Carolina v. United States*, 199 U. S., 437) is authority for the proposition that a business private in its nature is not taken out of the field of Federal taxation merely because a State sees fit to engage in it. Conversely, we submit, a function or business governmental in its nature is not thrown into the field of Federal taxation merely because a State entrusts its exercise to a railroad company or other public service corporation.

We have insisted and we still insist that *California v. Pacific Railroad Co.*, 107 U. S., 1, is authority for the proposition that Congress cannot tax any franchise granted by the State for either public or so-called private purposes. If this be denied it will hardly be denied that the case is authority for the proposition that Congress cannot tax a State corporation existing as an agency of the State, nor do we think it can be successfully claimed that the railroad in the case mentioned was a Federal agency in any other sense than a State railroad in the State of New York is an agency of that State.

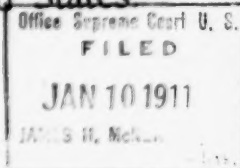
RICHARD V. LINDABURY,  
CHARLES W. PIERSON,  
ROBERT LYNN COX,  
Of Counsel for Appellants.

## CORPORATION TAX CASES.

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Supreme Court of the United States

OCTOBER TERM, 1910.  
Nos. 409 AND 410.



WYCKOFF VANDERHOEF,

*Appellant,*

vs.

THE CONEY ISLAND AND BROOKLYN RAILROAD  
COMPANY ET AL.,

*Appellees.*

FRANCIS L. HINE,

*Appellant.*

vs.

HOME LIFE INSURANCE COMPANY ET AL.,

*Appellees.*

### Brief for Appellants on Reargument.

RICHARD V. LINDABURY,  
CHARLES W. PIERSON,  
ROBERT LYNN COX,

*Of Counsel for Appellants.*



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# Supreme Court of the United States,

OCTOBER TERM, 1910, NOS. 409 AND 410.

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WYCKOFF VANDERHOEF,  
Appellant,

v.

THE CONEY ISLAND AND BROOK-  
LYN RAILROAD COMPANY *et al.*,  
Appellees.

---

FRANCIS L. HINE,  
Appellant,

v.

HOME LIFE INSURANCE COMPANY  
*et al.*,  
Appellees.

---

## BRIEF FOR APPELLANTS ON REARGUMENT.

### Statement.

The general question presented in these cases is the constitutionality of Section 38 (known as the Corporation Tax Act), forming part of the Act of Congress

approved August 5, 1909, (Statutes of the U. S. passed at the First Session of the Sixty-first Congress, 1909, pp. 11, 112-117) generally known as the "Tariff Act." The section is printed in full as an appendix to this brief.

These cases were numbers 751 and 752 on the docket of the October Term, 1909, and were originally argued and submitted in March, 1910. A reargument having been ordered we have taken the opportunity to rewrite our brief with special reference to the arguments then advanced by our opponents.

The cases come up from the Circuit Court of the United States for the Southern District of New York.

Each case came on to be heard below on bill and general demurrer, and in each a final decree was entered sustaining the demurrer and dismissing the bill; and thereupon an appeal was prayed and allowed direct to this Court on the ground that the constitutionality of a law of the United States was drawn in question.

As the questions of law involved in the two appeals are similar they will be dealt with in one brief. It will be necessary, however, to state the facts in the two suits separately.

#### **Number 409.**

This was a bill filed by Wyckoff Vanderhoef, a citizen of the State of New York, on behalf of himself and all other stockholders of the defendant company similarly situated, against The Coney Island and Brooklyn Railroad Company, a corporation of the State of New

York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant corporation is a street railway company organized under the laws of the State of New York and owning and operating various street railroads situated within said State and upon the public streets thereof. Its right to construct and operate its railroads in the public streets has been conferred by various special acts of the Legislature of the State of New York. Under the laws of said State it is authorized, by reason of the public nature of its business, to exercise the right of eminent domain, and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings (Record, fols. 2-4).

The Capital Stock of said corporation consists of \$2,983,900, divided into shares of the par value of \$100 each. Said corporation has a bonded indebtedness of \$3,500,000 and other indebtedness in excess of \$200,000. Its net income from all sources during the year ending December 31, 1909, amounted to more than \$205,000, after making all deductions of the character provided for in the Corporation Tax Act (Sec. 38 of the Act of Congress, approved August 5, 1909, entitled "An Act to provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes") (fols. 4-5).

The appellant is, and for a number of years has been, the owner and registered holder of ten shares of

the said corporation's capital stock, which shares are of large value. The capital stock of said corporation is divided among a large number of different persons, and this suit is for an object common to all (fol. 6). The said corporation and its directors have announced their intention voluntarily to comply with the provisions of the Corporation Tax Act, by making and filing the return and paying the tax therein provided for (fols. 6-7). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate (fols. 10-11, 16-17). The tax which the defendant corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said Act, would exceed the sum of \$2,000 (fol. 7). The bill charges that the provisions of the said Act imposing said tax are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued, it is unnecessary to set them forth here.

The bill further alleges that if the defendant corporation and its directors pay the tax, as they have declared their intention to do, they will thereby diminish the assets of the company and lessen the value of its stock and the dividends thereon, and that voluntary compli-

ance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits which would work irreparable injury to the business of the Company and involve it and its stockholders, including appellant, in irreparable loss (fol. 11). The bill further alleges that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000, and arises under the Constitution and laws of the United States, and that appellant and the other stockholders of the defendant corporation have no adequate remedy at law in the premises (fol. 12).

The prayer of the bill is that the taxing provisions of the said Act be adjudged unconstitutional, null and void, that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for, and for general relief (fol. 12).

#### **Number 410.**

This was a bill filed by Francis L. Hine, a citizen of the State of New York, on behalf of himself and all other stockholders and policyholders of the defendant company similarly situated, against Home Life Insurance Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant is a corporation organized under the laws of the State of New York and engaged in the busi-

ness of insuring lives. Its capital stock consists of \$125,000 divided into 1,250 shares of the par value of \$100 each, and its accumulated profits and other assets exceed in value the sum of \$22,000,000. By the laws of the State of New York the Company is required to invest its capital to the extent of \$100,000 in the stocks or bonds of the United States or of the State of New York or of the municipalities thereof, or in bonds and mortgages on improved unincumbered property in said State, and is authorized to invest the residue of its capital and its surplus moneys and funds in the securities aforesaid or in certain other specified kinds of real and personal property. The greater part of its assets are actually invested in real estate, United States Government bonds, bonds of the State of New York, corporate stocks of the City of New York, bonds of other municipal corporations within the United States, bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States, and real estate bonds and mortgages. (Record, fols. 2-3.) Included in its assets invested as aforesaid are \$1,112,000 and upwards of "unassigned funds," said unassigned funds being undivided profits (fol. 3). Its net income during the year ending December 31, 1909, amounted to a sum in excess of \$450,000 after making all deductions of the character provided for in the Corporation Tax Act (fol. 4). Appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said Com-



pany's capital stock of a value exceeding \$2,000. By the charter of said Company it is provided that the holders of its capital stock shall receive semi-annually dividends of six per cent., but shall not further share in the profits of the Company except as they may be entitled as policyholders. The capital stock of the Company is divided among a large number of different persons, and this suit is for an object common to them all. The charter of the Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company (unless otherwise agreed between the Company and the insured), and further provides that the net profits of the Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. Appellant is the holder of a \$2,500 policy of life insurance issued by said Company in 1891, and under the terms thereof is entitled to participate in the profits of the Company as the same shall be ascertained and apportioned from year to year, according to the provisions of its charter. The policyholders of the Company holding participating policies are very numerous, comprising more than forty-three thousand and representing in the aggregate more than eighty-one million dollars of life insurance, and this suit is for an object common to them all (fols. 5-6). The corporation and its directors have announced their intention

to voluntarily comply with the provisions of the Corporation Tax Act by making and filing the return and paying the tax therein provided for (fol. 6). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States (fols. 10, 16-17). The tax which the corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of the Act would exceed the sum of \$4,500 (fol. 7). The bill charges that the provisions of the Act are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued it is unnecessary to set them forth here.

The bill further alleges that if the Company's directors pay the tax as they have declared their intention to do they will thereby diminish the assets of the Company and lessen the funds applicable to the payment of dividends on its capital stock and participating policies including the stock and policy held by appellant; that it would be impossible to ascertain and measure the amount of damage and loss to appellant resulting therefrom; that said damage would be irreparable and incapable of ascertainment in an action at law (fol. 11); that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multi-

plicity of suits not only by its shareholders, but also by its numerous policyholders; and that in such suits all the policyholders of the Company, including appellant, would or might be necessary and proper parties by reason of their interest in the net income of the Company, and that such suits would work irreparable injury to the business of the Company and to appellant and the Company's other stockholders and participating policyholders (fol. 12). The bill further alleges that this is a suit of a civil nature in equity and that the matter in dispute exceeds, exclusive of interest and costs, the sum of Two thousand dollars, and arises under the Constitution and laws of the United States (fol. 12). The prayer of the bill is that it be adjudged that the taxing provisions of the said Act are unconstitutional; that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for; that the defendant Company be required to specifically perform the terms of its policy contracts with appellant and other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of the Company without subtraction or diminution by reason of anything contained in the Corporation Tax Act, and for general relief (fols. 12-13).

**SPECIFICATION OF ERRORS RELIED UPON.****I.**

That the Court below erred in sustaining the demurrer and dismissing the bills for want of equity.

Record in No. 409, fol. 28, Assignments of Error X, XI and XII;

Record in No. 410, fols. 27, 28, Assignments of Error XI, XII and XIII.

**II.**

That the Court erred in not holding that Section 38 of the Act is void because as to State corporations it constitutes an interference with sovereign powers and functions of the States not surrendered to the general government and expressly reserved to the States by the 10th Amendment.

Record in No. 409, fol. 25, Assignments of Error I, II and III.

Record in No. 410, fols. 23, 24, Assignments of Error I, II and III.

**III.**

The the Court erred in not holding that the taxes imposed or some portions thereof are direct taxes and

## II

that the provisions imposing the same are void because the taxes are not apportioned among the States.

Record in No. 409, fol. 26, Assignment of Errors IV;

Record in No. 410, fol. 25, Assignment of Errors IV.

## IV.

That the Court erred in not holding that Congress could not tax the stocks and bonds of States and municipalities thereof, and in not sustaining the bill to that extent.

Record in No. 410, fol. 25, Assignment of Errors V.

## V.

That the Court erred in not holding that said section of said Act is unconstitutional because the tax it imposes is arbitrary, non-uniform and unequal, and makes illegal discriminations and exemptions.

Record in No. 409, fols. 26, 27, Assignments of Error V, VI, VII and VIII.

Record in No. 410, fols. 25-27, Assignments of Error VI, VII, VIII and IX.

## VI.

That the Court erred in not holding that the tax is unconstitutional so far as the same is imposed on the

franchises or business of State railroads and other public service corporations.

Record in No. 409, fol. 25, Assignments of Error II and III.

### **PRELIMINARY POINT.**

**Equity has jurisdiction, at the instance of a stockholder, to restrain the threatened breach of trust on the part of directors in voluntarily paying and not resisting the collection of an unconstitutional tax.**

Pollock *v.* Farmers Loan & Trust Co.,  
157 U. S., 429, 553;

Dodge *v.* Woolsey, 18 How., 331;

Hawes *v.* Oakland, 104 U. S., 450.

It is unnecessary to argue this point at length in view of the careful consideration which the question received in the Income Tax Cases (Pollock *v.* Farmers Loan & Trust Co.). These suits are similar in nature and procedure to the Pollock case, which is believed to have settled the jurisdictional questions involved.

Since these cases were originally argued in this court and a reargument ordered the due date of the tax for the first year (June 30, 1910), has passed, and if defendants have carried out their avowed intention

the tax for said year has been paid. This fact may possibly be urged as ground for dismissing the appeals, on the theory that the Court does not sit to determine moot questions.

To take notice of any such claim the Court would be obliged to go outside the record. Even were the Court willing to do this the claim would be found to be without merit because

(a) To enjoin the payment of the tax for a single year was not the whole object of these suits. The bills sought to have the act declared unconstitutional and to prevent all payments thereunder, future as well as present.

As said by Holmes, *J.*, in *Giles v. Harris*, 189 U. S., 475, 484 (a suit in equity to compel the Board of Registrars to enroll plaintiff's name upon the voting list):

"The bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills v. Green*, 159 U. S., 651, 657, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903."

The principal object of the relief sought in the cases now before the Court is to prevent the defendants from wasting corporate assets in which plaintiffs have an interest by compliance with a statute which plaintiffs allege to be unconstitutional. The cases involve a grave public question whose importance is in no wise diminished by the payment of one year's tax (assuming such payment to have been made).

(b) If payment of the tax for the first year has in fact been made, defendants have made it after notice and pending the determination of suits involving their right to make it.

The situation differs radically, therefore, from that involved in the cases where this Court has dismissed an appeal owing to the happening of some event *without default of the defendant*, which renders it impossible for the Appellate Court to grant plaintiffs any effectual relief (see *e. g.* *Mills v. Green*, 159 U. S., 651). In that case the difference is pointed out by Justice Gray, as follows (p. 654):

"If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant



to undo what he has wrongfully done since that time or to answer in damages."

It would be a novel situation if defendants by their own act could render the court powerless and plaintiffs remediless. The court has power not only to enjoin such conduct in the future, but also to afford, under the prayer for general relief, suitable redress for what has already been done.

These are suits to restrain a threatened breach of trust by the directors of a corporation. They are not suits by a taxpayer to enjoin the collection of a disputed tax, and the decisions holding that in such cases the payment of the tax is ground for dismissal of the appeal (*e. g.* *San Mateo County v. Southern Pacific*, 116 U. S., 138; *Little v. Bowers*, 134 U. S., 547; *Singer Co. v. Wright*, 141 U. S., 696), have no application.

### POINT I.

**Nature of the tax; it is not a tax upon business or occupation, but is either**

- (a) A corporate franchise tax, or**
- (b) An income tax.**

The first thing to be ascertained is the exact nature of the tax. This will depend on the factors which de-

termine when and whether the tax shall be levied. The Act provides:

“SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources.”

Two factors (possibly three) determine when and whether the tax shall be levied. They are:

- (1) Existence as a corporation or other artificial entity;
- (2) Receipt of income;
- (3) Doing business.

Of these factors the first two must unquestionably be present. As to the third there is room for doubt. The language of the Act with respect to domestic cor-

porations is "Every corporation \* \* \* now or hereafter organized \* \* \* shall be subject to pay." Corporations doing no business are nowhere expressly exempted. The words "engaged in business in any State or Territory" apparently apply only to foreign corporations.

If the tax is to be construed as falling on domestic corporations which do no business, there is an end of the claim that the subject of the tax is business or occupation. A tax cannot be imposed on something that does not exist. If, however, the tax be construed as limited to corporations actually engaged in business, it by no means follows that the tax is an occupation tax. Section 32 of the Act of August 27, 1894, under which the Income Tax cases of 1895 arose, applied only to "corporations, companies or associations *doing business for profit* in the United States." Nevertheless the tax was held to be a direct tax and not an excise, so far at least as income from investments was concerned (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429; 158 *Id.*, 601). Moreover, taxes limited to corporations doing business have frequently been classified as corporate franchise taxes (see, *e. g.*, *Home Ins. Co. v. New York*, 134 U. S., 594).

The Act describes the tax as "a special excise tax with respect to the carrying on or doing business" by the corporations, joint stock companies and insurance companies on which it is imposed.

These words were taken almost verbatim from the

opinion of this Court in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397, and it is matter of public record, in the Senate debates on the subject, that the Spreckels case was supposed to afford a precedent for the tax sought to be imposed.

See *e. g.* Congressional Record for June 16, 1909, p. 3450; *Id.* for July 1, 1909, pp. 4069, 4077-8, 4079.

In the Spreckels case a tax had been imposed on a corporation carrying on the business of refining sugar, under an Act of Congress providing:

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."

(Act of June 13, 1898, Section 27.)

This Court sustained the tax as an excise tax on business or occupation, saying (p. 411):

"Clearly the tax is not imposed upon gross annual receipts as property; but only *in respect*

*of the carrying on or doing the business of refining sugar."*

It seems to have been assumed when these words were inserted in the present Act that they carried with them the nature of the tax concerning which they were spoken. We believe it can readily be demonstrated that this assumption was erroneous, that the present tax differs fundamentally in its nature from the tax involved in the *Spreckels* case, and that it is not a tax on business or occupation.

**A**

The tax is imposed only on artificial persons. Individuals and ordinary partnerships engaged in similar businesses are not taxed. The act construed in the *Spreckels* case, on the contrary, applied to "every person, firm, corporation or company" carrying on the business specified.

The fact that a tax is imposed on A and B and not on C and D, when all are carrying on the same kind of business, indicates that something else besides business or occupation is the subject of the tax.

It is of course true, as asserted by some of our opponents (see brief of Mr. Guthrie and associates of March 14, 1910, p. 11), that the States have frequently imposed excise taxes on corporations only, and that such taxes have been upheld by this Court. They have been upheld, however, as *franchise* taxes, imposed not only under the taxing power but also under the power

to regulate corporations. We have been unable to find a case where such a tax has been upheld as an *occupation tax*.

## B

The tax is measured by a percentage of the net income, not from business carried on, but "*from all sources*." In the act construed in the *Spreckels* case, on the contrary, the tax was limited to income received in the business sought to be taxed. This difference would seem to be decisive against the claim that the tax is to be construed as a tax on the businesses in which the various artificial persons subject to its operation are engaged. The measure adopted bears no necessary relation to, and does not vary reasonably with, the value of such businesses. One corporation engaged in a business which yields a net profit of \$5,000 pays no tax. Another corporation doing a precisely similar business at the same profit is nevertheless taxed provided it has an additional income from investments.

Our opponents seek to meet this difficulty in two ways.

1st. They argue that the words "from all sources" taken in connection with the context should be construed as limited to income from business and property used in business (see Government Brief of March, 1910, p. 40; Brief of Messrs. Guthrie *et al.* of March 14, 1910, p. 18). This construction, however, ignores the plain meaning of the words "from all sources."

Moreover, it is opposed to the explicit provisions of the Act subjecting to the tax (in the case of foreign corporations) "income received within the year from business transacted *and capital invested* within the United States."

2nd. Mindful of these difficulties, counsel for the Government advance the proposition that, in the case of a corporation, income "from all sources" means substantially the same thing as income from business, because the capital and surplus of a corporation, however invested, must be deemed to be employed in its business. To quote their exact language (Brief, p. 43):

"A corporation \* \* \* has no right to hold any property except for the purposes of the business, and therefore, as business assets \* \* \*. No corporation can claim that it holds property in any other way \* \* \*. It is legally estopped from questioning the business character of its assets."

The weaknesses of this reasoning are obvious. To mention a few of them:

(a) It entirely overlooks at least one source of corporate revenue, viz., gifts and subsidies. Railroads have frequently been the objects of State or municipal bounty. The income of manufacturing corporations is not infrequently augmented by subsidies of various kinds paid as an inducement to locate in a particular locality.

(b) It ignores various decisions of the Courts to the effect that the mere holding of investments and receiving income therefrom does not constitute "doing business" in the legal sense in the case of corporations any more than in the case of individuals.

In *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y., 46, the New York Court of Appeals held that a New Jersey manufacturing corporation carrying on a portion of its business in New York and having a portion of its surplus earnings invested in real estate in New York leased by it to third parties was not, with respect to such investment, carrying on business in the State.

In *Missouri Coal and Mining Co. v. Ladd*, 160 Mo., 435, the question was whether a foreign corporation organized for the purpose of mining, which had ceased mining and leased its lands for agricultural purposes, paying taxes thereon and receiving rents therefrom, was doing business in the State. The Supreme Court of Missouri held that it was not.

(c) The argument, if valid now, would have been equally good in the Income Tax cases of 1895 (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429). In those cases this Court held that a tax on income derived by a corporation from investments in real and personal property was a direct tax on such property. If, as now suggested in the Government brief, all income of a corporation is to be considered business income, the Court



and counsel in the *Pollock* case wholly overlooked a point decisive of the controversy, and the case was wrongly decided.

### C.

No kind or kinds of business are specified. The tax falls indiscriminately on the entire net income of all artificial persons (with certain enumerated exceptions not material to the present discussion) doing every conceivable kind of business. In the act construed in the *Spreckels* case, on the contrary, the tax was limited to certain specific businesses, viz., refining petroleum and refining sugar.

The difference is fundamental and marks two different kinds of tax. *The one is laid on business yielding income irrespective of who does it. The other is laid on persons possessing income irrespective of what business they do.* The former is the typical excise tax on business; the latter is a direct property tax (unless the limitation to artificial persons brings it within the class of corporate franchise taxes). A tax upon property or income generally, imposed merely because of ownership, is a property tax (see *Knox v. Moore*, 178 U. S., 41, at p. 81).

An excise tax on business, privileges, acts or commodities ordinarily involves the selection of some particular business, privilege, act or commodity to be taxed.

In *Maine v. Grand Trunk Ry. Co.*, 142 U. S., 217, the Court said, speaking of an excise tax (p. 227):

"The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue *certain* callings, or to deal in *special* commodities, or to exercise *particular* franchises" (italics ours).

In *Nicol v. Ames*, 173 U. S., 509, the Court said (p. 521):

"A tax upon the privilege of selling property at the Exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property*" (italics ours).

This language is quoted with approval in *Fairbank v. United States*, 181 U. S., 283, 293.

In *Thomas v. United States*, 192 U. S., 363, the Court held that the stamp duty imposed by the War Revenue Act of 1898 on sales of shares of stock in corporations was an excise and not a direct tax. Chief Justice Fuller, speaking for the Court, said (pp. 370-371):

"There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of *certain* commodities, privileges, *particular* business transactions, vocations, occupations and the like. \* \* \*

The sale of stocks is a *particular* business transaction" (italics ours).

In *Patton v. Brady*, 184 U. S., 608, the Court held that a tax on a particular article (viz., manufactured tobacco), imposed at a period intermediate the commencement of manufacture and the final consumption of the article, was an excise. Justice Brewer, discussing the nature of an excise as distinguished from a direct tax, said (pp. 617-18):

"Cooley, in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue *certain* trades, or to deal in *certain* commodities.' Bouvier and Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost, operating as an indirect tax on the consumer, levied upon *certain specified* articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue *certain* trades and deal in *certain* commodities.' \* \* \* Counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such, but upon *certain kinds* of property, having refer-

ence to their origin and their intended use”  
(italics ours).

In *Knowlton v. Moore*, 178 U. S., 41, Justice White said (p. 47):

“They (*i. e.*, inheritance and legacy taxes in France) are included officially under the general denomination of indirect taxes for the reason that all inheritance and legacy taxes are considered as levied on the ‘occasion of *a particular isolated act*’ ” (italics ours).

We do not claim, as our opponents seem to assume, that Congress *cannot* impose an excise tax in general terms upon all business and occupations without separate enumeration. The question is not what Congress can do but what has actually been done in this instance. In determining this question it is proper to take into account the features which differentiate this from the ordinary type of occupation tax, as well as the features which assimilate it to taxes of a different nature.

#### D.

That the tax cannot properly be construed as a tax on business or occupation is also shown by other features of the Act: *e. g.*, it extends to corporations and joint stock associations engaged in the business of exporting, and requires them to pay a tax upon the net income derived from such business. Congress cannot tax the business of exporting as a business (Constitu-

tion, Art. I, Sec. 9, subdiv. 5; *Brown v. Maryland*, 12 Wheat., 419; *Fairbank v. United States*, 181 U. S., 283) and the inclusion of such a provision in the present Act adds to the difficulty of classifying the tax with business or occupation taxes. Again, the tax is imposed upon corporations and joint stock companies wheresoever they are engaged in business, and requires them to pay a tax upon income derived, not merely from business done in this country, but also from that done in foreign countries. This follows from the generality of the language employed and the provision for deducting taxes paid by such corporations and joint stock companies in foreign countries "as a condition to carrying on business therein." It can hardly be claimed that Congress has power to tax a business as such when carried on beyond the jurisdiction of the United States. As said by Justice Field in *State Tax on Foreign-Held Bonds*, 15 Wall., 300, 319:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

If Congress cannot tax foreign business, this feature of the present tax also stands in the way of its classification with occupation and business taxes.

It is unnecessary to argue that the nature of the tax does not depend on what Congress has seen fit to label it.

As was pointed out by the Court in the Pollock case (157 U. S., pp. 580-583): "The name of the tax is unimportant;" \* \* \* "it is the substance and not the form which controls;" \* \* \* the limitations of the Constitution cannot be "frittered away" by calling a tax indirect when it is in fact direct. And again in *Galveston, &c. Ry. Co. v. Texas*, 210 U. S., 217, 227, the Court denied that "the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

## POINT II.

**If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the states not surrendered to the general government and expressly reserved to the states by the Tenth Amendment.**

As already shown (Point I, *supra*) the tax is not a tax on business or occupation. It follows that (if not an income tax) it is to be construed as a franchise tax, imposed in the case of domestic corporations and

joint stock associations upon the franchise to do business in their respective capacities, and in the case of foreign corporations and associations on the privilege of doing business in their respective capacities within the territorial jurisdiction.

Home Ins. Co. *v.* New York, 134 U. S., 594;

Society for Savings *v.* Coite, 6 Wall., 594;

Provident Institution *v.* Mass., *ibid.*, 611;

Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217;

Horn Silver Mining Co. *v.* New York, 143 U. S., 305;

People *ex rel.* *v.* Knight, 174 N. Y., 475.

In the *Home Insurance Company* case this Court held (as stated in the headnote) that

“A tax which is imposed by a State statute upon the ‘corporate franchise or business’ of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity.”

In *Society for Savings v. Coite and Provident Institution v. Mass.* (*supra*) it was held that a tax on savings banks measured by a percentage upon their deposits was a corporate franchise tax.

In *Maine v. Grand Trunk Ry. Co.* (*supra*) it was held that a tax on a foreign corporation measured by a proportion of its gross receipts within the State was "an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State" (p. 227). *Horn Silver Mining Co. v. New York* (*supra*) is to the same general effect.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax. Apparently the only joint stock companies taxed are such as have a statutory origin and enjoy franchises from the State. The language of the act is:

"Every corporation, joint stock company or association \* \* \* and every insurance company \* \* \* *organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or \* \* \* under the laws of any foreign country.*"

The words which we have italicized apparently qualify the words "joint stock company or association" as well as the words "corporation" and "insurance company," and seem to exclude from the operation of



the act such joint companies, if any there now be, as are merely common law partnerships. That many joint stock associations are artificial entities and possess and exercise legislative franchises substantially identical with those possessed and exercised by corporations is well established. (*Liverpool Insurance Co. vs. Massachusetts*, 10 Wall., 566; *People vs. Wemple*, 117 N. Y., 136; *Hibbs vs. Brown*, 190 N. Y., 167; *Adams Ex. Co. vs. State*, 55 Ohio St., 69; *Briar Hill Coal & Iron Co. vs. Atlas Works*, 146 Pa., 290; *Oak Ridge Coal Co. vs. Rogers*, 108 Pa., 147; *Attorney General vs. Mercantile Marine Insurance Co.*, 121 Mass., 524.)

Assuming then that this is the real nature of the tax, *i. e.*, that it is a tax upon corporate or quasi-corporate franchises, is it within the power of Congress to impose?

Unquestionably Congress may tax corporations organized under Federal law upon their franchises; any sovereignty may so tax its creatures; but corporations chartered by the States and doing only an intrastate business present a different situation. A State confers on John Doe and his associates the privilege or franchise of doing business in a corporate capacity. Can Congress impose a tax on the exercise of that privilege or franchise? The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create. (*McCulloch v. Maryland*, 4 Wheaton, 316.) If Congress can impose a tax of one per cent., it can impose a tax of ten

per cent. or fifty per cent., and thus impair or destroy altogether the value of corporate charters for business purposes. Does Congress possess such a power?

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. The United States is a Government of enumerated powers. The Constitution nowhere expressly confers upon Congress the right to grant corporate charters, and it is well settled that this right exists only in the limited class of cases where the granting of charters becomes incidental to some power expressly conferred. On the other hand, the right of the separate States to grant charters of incorporation is unquestionable. They had that right before the Union was formed and never surrendered it. In the Constitutional Convention of 1787, Mr. Madison twice moved that Congress be given power to grant charters of incorporation in certain cases, but the motions were not adopted.

(See Elliot's Debates on the Federal Constitution, 2nd Ed., Vol. V., pp. 440, 543.)

This Court has frequently recognized the plenary power of the States to grant and control the exercise of corporate franchises (See *e. g.*, *Home Ins. Co. v. New York*, 134 U. S., 594, 600-601; *Horn Silver Mining Co. v. New York*, 143 *id.* 305, 313), and long ago said of it: "*This power is incident to sovereignty.*" (*Briscoe v. Bank of Kentucky*, 11 Peters, 257, 317.)

The power to grant the franchise to do business in a corporate capacity being therefore inherent in the sovereignty of the States, it follows that a tax imposed by Congress upon the exercise of the franchise will constitute an interference with the power.

This court has said, and many times repeated in substance, that the National Government "cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action."

Railroad Company *v.* Peniston, 18 Wall.,  
5, 30.

Thus it has been held that Congress cannot tax the obligations of indebtedness of a State (*Mercantile Bank v. New York*, 121 U. S., 138, 162); that Congress cannot tax a municipal corporation (being a portion of the sovereign power of the State) upon its municipal revenues (*U. S. v. Railroad Co.*, 17 Wall., 322); that Congress cannot impose a tax upon the salary of a judicial officer of a State (*Collector v. Day*, 11 Wall., 113); that Congress cannot tax a bond given in pursuance of a State law to secure a liquor license (*Ambrosini v. United States*, 187 U. S., 1). A writer of high authority on Constitutional Law has said:

"There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxa-

tion is quite as much beyond the power of the National Legislature as if the interference were direct and extreme."

Cooley, Constitutional Limitations, 7th Ed., p. 684 (quoting from *Fifield v. Close*, 15 Mich., 505, 509).

In his dissenting opinion in the Peniston case *supra* (quoted with approval by the present Chief Justice in 162 U. S., p. 122), Justice Bradley said:

"It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General Government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence."

The precise question whether Congress can tax the corporate franchises of a State corporation has not been directly brought before this Court, because Congress has not heretofore attempted anything of the sort. The converse of the question, *i. e.*, whether a State can tax corporate franchises granted by Congress, has, however, been directly passed upon. In *California v. Central Pacific R. R. Co.*, 127 U. S., 1, the question was squarely presented. That was an action by the State of California to recover a tax assessed upon all the property and franchises of the defendant. Some of the defendant's franchises had been granted by Congress. The Court held the assessment void because these fran-

chises were included. Justice Bradley, speaking for a unanimous court, discusses the nature and origin of franchises, concluding that a franchise is "a right, privilege or power of public concern" existing and exercised by legislative authority. After enumerating various kinds of franchises, the opinion continues (p. 41):

"No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* \* \* \* In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 'The power to tax involves the power to destroy.' \* \* \* It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

This case is squarely in point, unless the rule there enunciated does not work both ways,—unless Congress can tax the franchises of a State railroad company but a State cannot tax the similar franchises of a railroad company chartered by Congress. Such a view would

run counter to the trend of decisions in this court during its entire existence. In the early case of *Chisholm v. Georgia*, 2 Dall., 419, Justice Iredell said (p. 435):

"Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them; of course the part not surrendered must remain as it did before."

In *The Collector v. Day*, 11 Wall., 113, the Court said (p. 124):

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

And again (p. 126):

"The supremacy of the general government, therefore, so much relied on in the argument of

the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality."

These views have been reiterated time and again in later cases. Moreover, they have been consistently applied. In *Weston v. City of Charleston*, 2 Peters, 449, it was established that a State could not tax the obligations of the United States, because such a tax operated upon the power of the Federal government to borrow money. In *Mercantile Bank v. New York*, 121 U. S., 138, 162, the converse was held, *i. e.*, that Congress could not tax the obligations of a State for the same reason. In *Dobbins v. Commissioners of Erie County*, 16 Pet., 435, it was held that a State could not tax the emoluments of an official of the United States. In *Collector v. Day*, 11 Wall., 113, the converse was held. As a State cannot impose a tax on the property or revenues of the United States (*Van Brocklin v. Tennessee*, 117 U. S., 151), so Congress cannot tax the property or revenues of a State or a municipality thereof (*United States v. Railroad Company*, 17 Wall., 322).

It will doubtless be urged that the tax in *California v. Central Pacific Railroad* was unconstitutional, not merely because it was imposed upon a franchise granted by the General Government, but because the Railroad Company was a governmental agency and performed governmental functions. But the same thing is true of a State public service corporation (like the Coney Island and Brooklyn Railroad Company, defendant in

No. 409). To provide means of transit and intercommunication for its citizens and troops has commonly been regarded as a governmental function of a State. In the exercise of that function Rome built her roads and New York her Erie canal. A State may exercise that function without private co-operation, or it may (and in this age of railways usually does) exercise it by conferring appropriate corporate franchises on individuals, endowing the corporation so formed with the governmental power of eminent domain, and leaving it to do the rest, subject to State supervision.

We submit, however, that the true test (and the test applied in the case cited) is found in *the nature of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered*. In the words of the Court, "The power conferred emanates from and is a portion of, the power of the government that confers it." The granting of a charter to an insurance company or other private corporation is as much an emanation of governmental power as is the granting of a charter to a national bank, and the possession or exercise of either is the possession or exercise of governmental power. In other words, *the exercise of the power to grant a charter of incorporation is always a strictly governmental function, whether the corporation so chartered is expected to act as a governmental agency or not*. It is a function peculiar to government or sovereignty and incapable of exercise



by any one else. It is a branch of, or incidental to the law-making power (1 Morawetz, Corporations, Sec. 8). A tax, therefore, on the franchise, or the exercise of the franchise, constitutes an interference with the exercise of a governmental function, irrespective of the character of the corporation which pays the tax.

The rule forbidding taxation by the States of patent rights or copyrights granted by the General Government (*People ex rel. Edison, &c., Co. v. Assessors*, 156 N. Y., 417; *People ex rel. v. Roberts*, 159 N. Y., 70; *In Re Sheffield*, 64 Fed. Rep., 833; *Commonwealth v. Westinghouse &c. Co.*, 151 Pa., 265; *Webber v. Virginia*, 103 U. S., 344) would seem to rest on the same reason, though it has not always been clearly recognized by the State Courts. The granting of a patent is an emanation of governmental power and the exercise of a governmental function, and therefore immune from State interference, irrespective of the nature or intended use of the patent itself.

The principle for which we are contending is well summarized in

*Wisconsin Railroad Co. v. Price County*,  
133 U. S., 496, 504,

where, speaking of the lack of power in a State to tax property of the United States, the Court says that the exemption

“is founded upon that principle which inheres in every independent government, that it must

be free from any such interference of another government as may tend to destroy its powers or impair their efficiency."

That corporate franchises granted by a State are beyond the taxing power of Congress follows from another line of reasoning. Chief Justice Marshall, in words often repeated by this Court, defined the limitations of the taxing power as follows: (*Weston v. City Council of Charleston*, 2 Peters 449, 467).

"All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission."

Applying the test here proposed,—can it be contended for a moment that the corporate franchise of a state corporation exists "by authority" of the General Government, or is "introduced by its permission"? Congress did not grant the franchise, and cannot amend or revoke it, or regulate its exercise when not employed in inter-state commerce. The Federal Government cannot maintain *quo warranto* proceedings to forfeit a state franchise or oust the possessor thereof. All these powers belong exclusively to the State. Congress undoubtedly can impose on artificial persons the same taxes that it can impose on natural persons. It

can tax the property and business of A. B. C. & Co., a partnership engaged in the business of sugar refining, and its power to impose those taxes is not diminished if A. B. & C. choose to incorporate as the A. B. C. Company. A tax on the corporate franchise, however, goes further and seeks to reach something new,—something which in the case of individuals has no existence at all,—which comes into being only by the exercise of the sovereign power of a State,—which “emanates from and is a portion of, the power of the government that confers it,” (127 U. S., 41), and exists during the pleasure of that government. In other words such a tax seeks to reach the corporate life, a thing which Congress did not give and cannot take away, unless by the destructive power of taxation.

A word as to certain specific propositions advanced on behalf of the Government. It is argued in effect that this tax does not constitute an interference with the powers of the States because:

First. It is not upon corporate franchises but upon their use (Government Brief of March, 1910, p. 79).

Second. Such franchises are not, properly speaking, created by the States but “are ultimately and fundamentally created by the persons who decide to take advantage of the law, which merely permits incorporation” (*Id.*, p. 80).

Third. The United States is supreme and the State subordinate. “It does not follow and is not true that

the United States may not by taxation burden or hamper the operation of a State law because a State may not by taxation burden or hamper the operation of a law of the United States" (*Id.*, p. 87).

To the first argument we answer briefly that the tax would seem to be equally an interference with the power of the State which creates the franchises, whether it be construed as a direct tax on the franchises regarded as property, or as an excise tax on their enjoyment regarded as privileges.

To the second argument we answer that it is unsupported by authority and opposed to the decisions of this Court holding that the franchise of corporate capacity is an emanation of sovereignty (*e. g.*, *California v. Central Pacific R. R. Co.*, 127 U. S., 1; *Briscoe v. Bank of Kentucky*, 11 Peters, 257).

To the third argument we answer, the supremacy of the United States is confined to matters within its sphere under the Constitution. As to powers reserved to the States, *e. g.*, the right to grant charters of incorporation for ordinary business purposes, the States "are as independent of the General Government as that Government within its sphere is independent of the States." (*The Collector v. Day*, 11 Wall., 113.)

We proceed to examine briefly certain cases asserted to be at variance with the views above expressed.

It is asserted in the Government's brief of March, 1910 (p. 72), that the proposition that "the tax is not

an infraction of the general power of the States . . .  
 . . . " was directly involved and necessarily decided in  
*Railroad Co. v. Collector*, 100 U. S., 595;  
*United States v. Erie Ry. Co.*, 106 U.  
 S., 327;  
*Spreckels Sugar Refining Co. v. McClain*, 192 U. S., 397.

We dispute this assertion.

The Act construed in the *Spreckels* case did not single out corporations, but applied to "every person, firm, corporation or company" carrying on the business specified.

In *Railroad Co. v. Collector*, the question of infraction of State power was not raised or discussed by counsel or court. The only question considered was whether the tax on a certain class of companies, measured in part by interest paid on bonds, was laid on the bondholder or on the business. The latter view was adopted, and the Court took occasion to say (p. 596):

"As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

The case in 106 U. S. involved the same question and was to the same effect.

*Pacific Insurance Company v. Soule*, 7 Wall., 433, is claimed to be an authority for the tax on insurance companies. That case upheld a Federal tax on an insurance company measured by a percentage of its premium receipts. The tax was described as "upon the *business* of an insurance company" and was sustained on the ground that it was an excise or duty and not a direct tax. That it was a tax on business, whereas the present tax is not, will be clear from a brief comparison of the two Acts. In the *Soule* case the Act applied not only to "every insurance company" but also to "every association or individual engaged in the business of insurance." (13 U. S. Statutes at Large, 276.) The present Act applies only to artificial persons. Moreover, large classes of artificial persons are expressly exempted. For example, fraternal beneficiary societies, orders and associations operating under the lodge system, which corporations, as is well known, do a very large part of the insurance business of the country. In the *Soule* case the income taxed was income received from the insurance business. The present Act taxes income "from all sources." In the *Soule* case a particular business was selected for taxation. The present Act taxes all artificial persons indiscriminately, regardless of the kind of business transacted. It is clear, therefore (for the reasons discussed in Point I, *supra*), that the tax involved in the *Soule* case was of a different nature from the tax now before the

Court and that the case affords no precedent for this tax.

*Veazie Bank v. Fenno*, 8 Wall., 533 (which upheld the statute taxing out of existence the circulation of the State banks), has been asserted to sustain the right of Congress to levy a tax upon a franchise or privilege granted by a State. It is true that in that case the eminent counsel for the bank (Messrs. Reverdy Johnson and Caleb Cushing) argued unsuccessfully "that the act imposing the tax impaired a franchise granted by the State, and that Congress had no power to pass any law which could do that" (see 8 Wall., p. 535), and that two justices dissented on that ground. The conclusive answer to this argument was, however, that the power of the States to grant the particular right or privilege in question was subordinate to powers expressly conferred on Congress by the Constitution; that Congress was given power under the Constitution to provide a currency for the whole country, and the Act in question was legislation appropriate to that end. The case does not hold that Congress has any general power to tax franchises or privileges granted by a State. The decision was expressly put on other grounds, and the remarks of the Chief Justice on the taxation of franchises (found at p. 547 and quoted in the Government brief) are merely dicta.

*Knowlton v. Moore*, 178 U. S., 41 (the Federal Inheritance Tax case), has also been asserted to be an authority for the right of Congress to tax a privilege

granted by a State. It is true that in that case the Court discussed and overruled the contention that Congress cannot impose an inheritance tax because inheritances are regulated by State law. The Court, however, concluded, after an exhaustive examination of the subject, that the tax did not fall on any privilege from the State. An inheritance tax falls on the transmission or transfer. As Mr. Justice White, writing for the Court, said (p. 59):

“The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.”

The transmission or transfer is not a privilege granted by a State, but necessarily follows and results from the fact of death. A man dies and his property perforce passes from him. That is the transmission. The State does not originate it, but merely prescribes the channels in which it shall flow. This right of regulation is not the subject of the tax. The tax would be due, like the tax upheld in the *License Tax Cases* (5 Wall., 462), if there was no regulation whatever.

*South Carolina v. United States*, 199 U. S., 437 (the



South Carolina Dispensary case), has been asserted to be an authority for the right of Congress to tax the exercise of powers or functions by a State. The powers and functions in question, however, were not of a governmental character. Moreover, the case does not touch at all the question of the right of Congress to tax franchises granted by a State. The tax which was upheld was a tax upon the business of selling liquor. The right to sell liquor is not a franchise granted by a State any more than the right to sell boots, though the State in the exercise of the police power may regulate the business or even take it over altogether and conduct it through agents of the State. South Carolina had done this, and the question in the case was as to the right to tax a State agency. The question of the right to tax a franchise or privilege from the State was not involved. The Court held that the State could not, by taking over a private business, deprive the Federal Government of a right of taxation which had always existed, pointing out that otherwise "it would be within the competency of the States practically to destroy the efficiency of the National Government."

This Court in both the cases last cited lays much stress on the historical argument, *i. e.*, that the power of Congress to impose the taxes in question had been conceded from the foundation of the Government and frequently exercised. The tax now before the Court, on the contrary, is an innovation of the year 1909.

We are not contending here (as were appellants

in the Inheritance Tax case and the South Carolina Dispensary case), in favor of any right or power of a State to narrow the field of Federal taxation or withdraw from the taxing power of Congress any subject matter over which that power has ever been exercised. On the contrary we are resisting an attempted encroachment by Congress on an entirely new field, created by and heretofore reserved exclusively to the separate States. Congress can tax a property and business owned by individuals. It can tax the same property and business when owned by a corporation. The act of the State in clothing the individuals with corporate franchises withdraws no source of Federal revenue. Does it on the contrary create a new subject matter for taxation by the General Government? That is the proposition involved in the claim of a right in Congress to tax corporate franchises granted by a State. We submit that there is no ground for such a claim, either in reason or in precedent.

**The Tax Cannot Be Sustained as a Tax on Franchises as Property.**

It may be urged, in reliance on certain dicta in *Veazie Bank v. Fenno*, 8 Wall., 533, 547, that the tax is imposed on franchises, not as privileges from the State, but as *property*.

We do not think the Act is open to that construction. There is no provision for ascertaining the value

of the franchises as property, either by appraisement or otherwise.

Even if the Act were to be so construed, however, appellees would be in no better position, because:

(a) The fact that a tax is on property does not render it constitutional if it nevertheless involves an interference with sovereign powers or instrumentalities of a State. The tax involved in *U. S. v. Railroad Co.*, 17 Wall., 322, was a property tax, but that fact did not save it.

(b) If the tax is on franchises as property it is a tax imposed on real or personal property, and is void under Article I, Sections 2 and 9, of the Constitution, as being a direct tax not apportioned according to population.

*Pollock v. Farmers' Loan & Trust Co.*,  
157 U. S., 429.

On Rehearing, 158 U. S., 601.

**The Principle Menaced by the Claim of a Right in Congress  
To Tax the Franchises of State Corporations, and the  
Practical Consequences if Such a Claim Be Upheld.**

The amount of the present tax is not large when compared with the aggregate assets of the artificial persons on which it is laid. The principle involved, however, is fundamental and vital. It touches the right of each State under the compact evidenced by

the Federal Constitution to manage its internal affairs free from compulsion or interference by the other States.

In some parts of the country the anti-corporation feeling runs high. Many men, both in Congress and out, if given their way would tax the larger corporations out of existence. If this Act is upheld in principle the way is open whenever these men can secure a majority in Congress. An increase in the tax rate is all that would be necessary. Make the rate ten per cent. or twenty per cent. instead of one per cent. and the thing is accomplished.

New York may deem it good policy to encourage the carrying on of industry in a corporate form. Texas may take a different view and conclude that the solution of the Trust problem lies in suppressing certain classes of corporations altogether. If the principle of this Act is upheld it will be within the power of Texas and her associates in Congress to impose their views on New York and make it impossible for her domestic industries to be carried on profitably in a corporate form. The possibility of so impressing the will of one State or group of States upon another State with respect to her internal affairs is the very thing which the founders of the Government sought most carefully to avoid. Had it been supposed that the grant of taxing powers to the General Government involved such a curtailment of State independence it is doubtful, to say the least, whether enough States would have consented to ratify the Constitution.

**POINT III.**

**If the tax be construed as an income tax it is unconstitutional (a) because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the states according to population; and (b) because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the states. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.**

The Act provides

“That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually a [*special excise*] tax [*with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company,*] equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year,” etc.

Strike from the Act the words which we have bracketed and it becomes clearly an income tax (if it is not a corporate franchise tax). Can the addition

of those words be said to change the nature of the tax? They are merely words of description or characterization, in no wise affecting any of the substantive features of the tax. And as already seen (Point I *supra*), the nature of the tax depends upon its substantive features—not on what the legislature has seen fit to call it. “It is the substance and not the form which controls.” (157 U. S., 581.)

It will be illuminating to compare the tax with the corresponding features of the act declared unconstitutional in the Pollock case. Section 32 of that act (28 Stat., 509, 556, c. 349), provided

“That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all \* \* \* corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships.”

Comparing the provisions just quoted with the Act now under consideration it will be seen that while they differ in phraseology the only difference in substance is that the Act of 1894 imposed a tax of two per centum “on the net profits or income” of corporations, while

the present tax is "equivalent to one per centum upon the entire net income over and above five thousand dollars." The fatal characteristic of the Act of 1894 as found in the Pollock case was that it imposed without apportionment a tax on persons "solely because of their general ownership of property." (*Knowlton vs. Moore*, 178 U. S., 41, 82.) That characteristic pervades every feature of the present Act and is intensified by the addition of the word "entire."

We assume that if this court construes the tax as an income tax it will feel itself constrained to follow the decision in the Income Tax cases. (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429; 158 U. S., 601.) We deem it unnecessary, therefore, to discuss the considerations on which that decision was based. No case ever received more thorough or exhaustive consideration. It has been frequently cited as authority in later decisions of this court and has been acquiesced in by the country at large. The method of providing for a valid Federal income tax which it pointed out (*viz.*: by constitutional amendment) is actually being pursued. Such a constitutional amendment has been proposed by Congress (see Joint Resolution of Congress, p. 185 of Statutes of 1909) and is now before the State legislatures for ratification. Under these circumstances the questions involved in the Income Tax cases may well be considered as definitely and finally settled.

It only remains to point out that the corporations

involved in the cases in which this brief is filed (Nos. 409 and 410) derive income from sources which bring them squarely within the decision in the Pollock case. The Home Life Insurance Company (Appellee in No. 410) has many millions of dollars invested in real and personal property and in Government, State and municipal securities, and derives a large income from such investments.

See Record, p. 2, fol. 3.

The Coney Island and Brooklyn Railroad Company (Appellee in No. 409) derives substantially its entire income from the use of real and personal property, and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

See Record, p. 5, fols. 9, 10, Laws of New York 1909, Chap. 62, Sec. 2.

That the inclusion of these objects in the taxing scheme of 1894 rendered the whole scheme void was one of the points decided in the Pollock case. The court considered that the scheme must be regarded as a whole and that the provision for a tax on the income from real and personal property formed a vital part of it. The same reasoning, we submit, applies to the present Act. This Act contemplates a tax upon the entire net income of corporations and joint stock associations derived from all sources. The amount of income derived by corporations—notably insurance



companies—from real estate and invested personal property is very large, and the taxation of this income is as vital a part of the present scheme as it was of that of 1894. If this were deducted a large part of the anticipated revenue would be eliminated and the tax would cease to be upon the entire net income as contemplated by Congress. A tax upon net income received from all sources except from invested capital and surplus is very different in operation and effect from a tax upon entire net income from all sources.

#### POINT IV.

**The tax ordained by the Act is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.**

That Congress may impose an excise tax upon the carrying on of a particular business is, of course, well established. Of this character was the excise imposed upon the insurance business and upheld in *Pacific Insurance Co. vs. Soule*, 7 Wall., 433, and that imposed upon the refining of sugar and petroleum and upheld in *Spreckels Sugar Refining Co. vs. McClain*, 192 U.

S., 397. The taxes considered in both of those cases, however, were exacted from all persons, co-partnerships and corporations engaged in the particular business excised and there was, therefore, no element of arbitrariness or inequality contained in the Acts imposing them. In addition to these Congress has at various times passed numerous other Acts imposing excise taxes upon selected and classified occupations, callings or privileges, none of which, however, bore any resemblance to the present Act. Here, for the first time, we have a tax claimed to be an excise which is levied upon every conceivable business, occupation or calling in which any individual, co-partnership, joint stock association or corporation may engage, but limited to those only who carry on such business in joint stock or corporate form. The result is to impose upon one competitor in a particular line of business a burden that is not imposed upon another engaged in the same line, with the ultimate effect of compelling the discontinuance of the business discriminated against, which could only be carried on under such circumstances at a ruinous disadvantage.

Undoubtedly Congress may classify the objects of taxation, but such classification must be reasonable and must be based upon characteristics which differentiate persons and objects within the class from those who are omitted and it must include all who are within the principle upon which it is based. No classification, we submit, could be more unreasonable, arbitrary or vi-

cious than one which includes, for the purpose of taxation, some members of a class engaged in a competitive business and excludes others of the same class. The result of such a classification must be to favor some at the expense of others and violate the principle of equality which lies at the basis of all just legislation. In *Cooley on Taxation*, at page 259, it is well said:

“Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax laid exclusively on merchants’ goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a partic-

ular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of money were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

If Congress may impose an exclusive tax upon corporations and joint stock associations with respect to the carrying on of a business which others may engage in upon equal terms, why may it not impose a like tax upon single men, women, foreign born citizens, or red-haired men? If the principle of arbitrary selection be once allowed, who can set bounds to its exercise?

And not only are corporations and joint stock associations arbitrarily selected for taxation, but some corporations are as arbitrarily exempted. Thus the Act exempts fraternal benefit societies, orders or associations operating under the lodge system, and domestic building and loan associations.

The enormous business done by the last-named associations is well known. Their profits are greater than those of the average bank, trust company or sav-

ings institution. They are in no sense public, charitable, religious or benevolent associations. They engage in business solely for the profit of their members and they compete directly with savings banks, trust companies and insurance companies in the loaning of money. Why should the latter be taxed and they exempted? What is there in their business that justifies a discrimination in their favor as against savings banks and mutual insurance companies? Referring to the exemption of these associations in the Income Tax Act of 1894, Mr. Justice Field in the Pollock case said (p. 598):

“The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. \* \* \* The census report submitted to Congress by the President, May 1, 1894, shows that their property in the United States amounts to over \$628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress, and be freed from their just, equal and proportionate share of taxation, when others engaged under different names, in similar business, are subjected to taxation by this law?”

So with fraternal benefit associations doing business under the lodge system. How do they differ in

principle from mutual life insurance associations? Both exist for the benefit of their members and neither is more benevolent or beneficial to society than the other. They are in constant competition everywhere for business, and yet one is taxed on the business it does and the other exempted. To quote again from the opinion of Mr. Justice Field in the Pollock case (p. 595):

“Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. (Citing cases.) Cooley in his treatise on Taxation (2d Ed., 215), justly observes that ‘It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.’”

Nor do the unequal, arbitrary and discriminating features of the Taxing Act end here or affect corporations and joint stock associations alone as a class, but they are also to be found within the selected class it-

self. We call attention to three of them that directly affect the defendant corporations in these cases.

1. The tax, although purporting to be a tax on the doing of business is not limited to the income derived from the business done, but is imposed upon, or calculated according to, the entire net income over and above Five thousand dollars, received by the owner, from all sources whatsoever. The result is that if one corporation derives a net income of \$100,000 wholly from a business carried on by it and another carrying on a business of the same kind and making an equal profit, receives an additional income of \$100,000 from investments which may be in State or United States bonds, exempt from taxation, one is taxed one thousand dollars and the other two thousand for the exercise of exactly similar privileges with exactly similar results.

Of the victims of this discrimination, defendant Home Life Insurance Company is one. It has over \$16,000,000 invested in interest bearing securities, upwards of \$1,100,000 of which consists of undivided profits; and these investments, to the extent of several hundred thousand dollars are in State, Federal or municipal securities (Record, p. 2, fol. 3). If any part of the interest derived from these investments can be said to be income from business that cannot be said of the interest from the \$1,100,000 of undivided profits, and yet the company is required to pay the same tax upon this latter as upon the earnings from its business.

2. The Act provides for a deduction from the gross income received by the corporation or joint stock association taxed, on account of interest paid on its bonded or other indebtedness, up to the amount of its capital stock, and no more. The result is, that if one corporation has \$1,000,000 of capital and \$1,000,000 of indebtedness, upon the latter of which it pays interest at the rate of four and one-half per cent., and makes in a given year a profit over operating expenses of \$50,000, it has no tax to pay because it is allowed a deduction on account of the \$45,000 paid as interest on its indebtedness, while another corporation doing the same amount of business and making the same profit above operating expenses is compelled to pay tax on \$45,000 of its gross income if it happens to have a capital stock of only one hundred thousand and an indebtedness of eleven hundred thousand upon which it pays the same rate of interest. In other words, a corporation in the situation last supposed is compelled to pay a tax not upon its net income—for it has none—but upon the interest of what it owes. This feature of the Act operates directly against defendant, The Coney Island and Brooklyn Railroad Company. That Company has a capital of \$2,983,900 and an indebtedness of \$3,700,000 (Record, p. 3, fol. 5), making a difference of \$716,100. On its indebtedness it pays interest at the rate of four per cent., which on \$716,100 amounts to \$28,644. It is required by the Act to pay



a tax on its total net income, and on this \$28,644 besides.

3. The Act requires corporations and joint stock associations to pay a tax on their *entire* net income received from all sources and so compels a corporation or joint stock association doing business both here and abroad to pay a tax upon the income of its foreign business for the privilege of doing its business here, notwithstanding that its domestic business may be less than five per cent. of its total business. That the effect of this is a discrimination against the larger life and fire insurance companies is apparent. These companies, as is well known, do a world business. In the United States and its dependencies they compete everywhere with the foreign insurance companies. The latter, however, by the terms of the Act are only required to pay a tax on their net income derived from the business they do in this country, while the domestic companies, for the privilege of doing the same business, are compelled to pay a tax on their foreign business, which in some cases may be so large as to make it impossible for them to compete successfully here with their foreign rivals.

In *People vs. Mensching*, 187 N. Y., 8, the New York Court of Appeals had before it an Act imposing a tax on transfers of stock of domestic and foreign corporations calculated at the rate of two cents "on each share of \$100 of face value or fraction thereof." The Act was held unconstitutional because

the tax imposed did not operate alike on all stocks, but, without any basis for classification, bore heavily on some stock and lightly on other stock. The Court said (pp. 18, 21):

“While the legislature has wide latitude in classification its power in that regard is not without limitation. \* \* \* While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. \* \* \* Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same **class alike**, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give ‘that equal protection and security’ to which all, under like circumstances, are entitled ‘in the enjoyment of their

personal and civil rights.' (Citing cases.) By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest disregard of justice and principle.

\* \* \* This is not classification, but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some, and lets others go. The rule governing the subject as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection.' "

If these various arbitrary selections and discriminations are permissible, what is to hinder a majority of Congress from destroying any or all State corporations, or any or all State franchises, at its mere will or whim? And if this can be done, what do constitutional guaranties amount to and what is to become of the reserved rights of the States? We earnestly protest that Congress has no such arbitrary power; that

the existence of such a power would be in conflict with the fundamental principles upon which our government was established; that the first ten amendments to the Constitution were adopted for the very purpose of safeguarding the States against the attempted exercise of such a power, and that the provisions of the Fifth Amendment declaring that "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation," furnish ample protection against its attempted exercise in a case like the present.

Hamilton, writing for the *Continentalist*, said:

"The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue." (1 Hamilton's Works, Edition 1885, 270.)

Speaking upon the same subject, Mr. Justice Field, in the Pollock case, said (p. 599):

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of

a tax. 'This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress.'

In *Dillon on Municipal Corporations* at Section 736, it is said:

"Equality, indeed, so far as practicable, is inherent in the very idea of a tax, as distinguished from arbitrary exaction."

At Section 737, it is further said:

"Taxation \* \* \* implies that the imposition shall be upon some system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed."

In *Desty on Taxation* at Section 10, it is said:

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending

to that end is indispensable. \* \* \* Where property is taken from the citizen by the sovereign will and appropriated without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions are exacted from such constituent members of the same community generally as own the same kind of property. \* \* \* A tax may be a capitation or a property tax, direct or indirect, *ad valorem* or specific, and though it may not be universal, yet it must be general and uniform."

In *People vs. Salem*, 20 Mich., 452, the Supreme Court of Michigan held a statute invalid, as not within the taxing power, irrespective of any constitutional limitations. In discussing the subject, the Court said (Cooley, J., p. 473):

"It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. \* \* \* I understand that, in order to render valid a burden imposed by the Legislature under an exercise of the power of taxation, the following requisites must appear. \* \* \* 2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so

that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. \* \* \* Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. \* \* \* The principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action."

In *State vs. Township of Readington*, 36 N. J. L., 66, 70, Depue, J. (afterwards Chief Justice), said:

"A tax upon the persons or property of A, B and C, individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation."

In *State vs. Mayor of Newark*, 37 N. J. L., 415, 421, Beasley, C. J., said:

"I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation, is not a limited right. \* \* \* If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property, does not exist."

In *Durach's Appeal*, 62 Pa. St., 491, 494. Sharswood, J., said:

"There is no limitation of these powers" (*i. e.*, the power of taxation by municipal governments) "expressed in the constitution of Pennsylvania as there is in the constitutions of some of our sister States; but, nevertheless, there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use without making compensation, and a special tax levied upon an individual, or upon particular individuals, would infringe this restriction."



As is well understood, the Due Process clause of the Fifth Amendment is an adaptation of the provisions of Magna Charta guaranteeing Englishmen against the deprivation of life, liberty or property except by the judgment of their peers and the law of the land.

"Due Process of Law" and "The Law of the Land," therefore, mean the same thing in constitutional law, and as remarked in *Bank of Columbia vs. Okcly*, 4 Wheat., 235, 244:

"After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the *arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*" (Italics ours.)

The term Due Process of Law is also to be found in the Fourteenth Amendment and Mr. Justice Field speaking of it in that connection in the *Santa Clara Tax case*, 9 Sawy., 170, 187, said:

"The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation levelled against

special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbances in society, of more insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel, in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law—'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation*—nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation*.' No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation, without due process of law, is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

In *Loan Ass'n v. Topcka*, 20 Wall., 655, 663, the Court said:

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. \* \* \* The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief

Justice Marshall, in the case of *McCulloch v. The State of Maryland*, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

In *Gulf, C. & S. F. Ry. Co. v. Ellis* 165 U. S., 150, 154, 159, it is said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. (Citing cases.) The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold

from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

\* \* \* \* \*

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and ac-

tion of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits or right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.*" (Italics ours.)

The latest reported utterance of this Court on the subject is found in *Southern Railway Co. v. Greene*, 216 U. S., 400.

In that case it was held that a statute of Alabama imposing a tax on a foreign corporation authorized to do business in the State which was not imposed on domestic corporations owning the same character of property and carrying on the same kind of business was unconstitutional as in violation of the equal pro-

tection clause of the Fourteenth Amendment. Mr. Justice Day said (p. 417):

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

If the tax involved in these cases be not a corporate franchise tax, but a tax on business or occupation as claimed by the Government, it is difficult to see why the

imposition of the tax upon corporations and the exemption of partnerships and individuals owning the same character of property and carrying on the same kind of business is not equally arbitrary.

### POINT V.

**Whatever view may be taken of the Act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of State railroads or other public service corporations, because an interference with State agencies or instrumentalities.**

The franchises of intra-state railroad corporations (like appellee, The Coney Island and Brooklyn Railroad Company), are conferred by a State for public purposes. These corporations are formed, in part at least, for the purpose of aiding the State in the discharge of a governmental function, viz., to provide means of transit and inter-communication for its citizens and troops. Their business is of a public character, subject to regulation by the State in the public interest and not to be abandoned without the State's consent. They are controlled or are controllable in all their operations by the State, which has the right, not infrequently exercised, of fixing the rates they

shall charge and prescribing in detail the service they shall render. In exercising the power of eminent domain, they exercise a power and perform a function of the State which charters them. The exercise of this power is part of their business. With some of them it doubtless constituted a part of the business transacted during the year ending December 31, 1909, which is what the Act purports to tax.

Conceding the right of the General Government to tax the *property* of these corporations as distinguished from their franchises or business (Railroad Company *v.* Peniston, 18 Wall., 5), it is not perceived how Congress can tax their franchises or business without violating the well-established principle that neither the General Government nor a State can tax the agencies or instrumentalities of the other.

The South Carolina Dispensary case (South Carolina *v.* United States, 199 U. S., 437) is authority for the proposition that a business private in its nature is not taken out of the field of Federal taxation merely because a State sees fit to engage in it. Conversely, we submit, a function or business governmental in its nature is not thrown into the field of Federal taxation merely because a State entrusts its exercise to a railroad company or other public service corporation.

We have insisted and we still insist that *California v. Pacific Railroad Co.*, 107 U. S., 1, is authority for the proposition that Congress cannot tax any franchise granted by the State for either public or so-called pri-



vate purposes. If this be denied it will hardly be denied that the case is authority for the proposition that Congress cannot tax a State corporation existing as an agency of the State, nor do we think it can be successfully claimed that the railroad in the case mentioned was a Federal agency in any other sense than a State railroad in the State of New York is an agency of that State.

### POINT VI.

**The fact that insurance companies are specifically mentioned in the act does not differentiate them from the other corporations subject to the tax or indicate that as to them the tax falls on business or occupation.**

The assertions to the contrary in the briefs of our opponents are, we submit, clearly mistaken. The Act imposes a tax on corporations and associations "having a capital stock represented by shares *and every insurance company.*" Obviously the insurance companies are specifically named because otherwise the large class of such corporations doing business on the mutual plan without capital stock represented by shares would escape the tax.

In *Pacific Insurance Co. v. Soule*, 7 Wall., 433, the situation was entirely different. The tax imposed in that case had all the features lacking here of an excise

tax on business or occupation; *i. e.*, not only was a particular business singled out for taxation, but the tax was imposed on "every association or individual engaged in the business of insurance" as well as on "every insurance company," and was measured not by income from all sources but by receipts from the business taxed (13 U. S. Statutes at Large, 276).

Were there opportunity on this appeal to discuss the Act on economic and moral grounds as well as in its strictly legal aspects, it could readily be demonstrated that of all the features of the Act the tax on life insurance companies doing business on the mutual plan is the most indefensible. The net income of such corporations is not, properly speaking, profits but represents for the most part the "loadings" of premiums in excess of the mathematical cost of insurance, exacted of the policy holders for reasons of prudence and safety in the conduct of the business. These loadings belong equitably to the policy-holders, who contributed them and are entitled to receive them back from time to time in what, for want of a better name, have been called dividends. A tax which does not allow for the deduction of these so-called "dividends" is an addition to the cost of insurance and falls on the income of the people of small means who make up the great body of policyholders.

RICHARD V. LINDABURY,  
CHARLES W. PIERSON,  
ROBERT LYNN COX,  
Of Counsel for Appellants.

**APPENDIX.**

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock

companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a rea-

sonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided*, That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and

necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it

within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its prin-

cipal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company, at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and proper-



ties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other in-

debtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith

by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter

required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect,

or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.





**CORPORATION TAX CASES.**

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**Supreme Court of the United States.**

OCTOBER TERM, 1909.

No. ~~754~~.

409

Office Supreme Court U. S.  
FILED

MAR 11 1910

JAMES H. MCKENNEY,  
Clerk.

WYCKOFF VANDERHOEF,  
*Appellant,*  
vs.

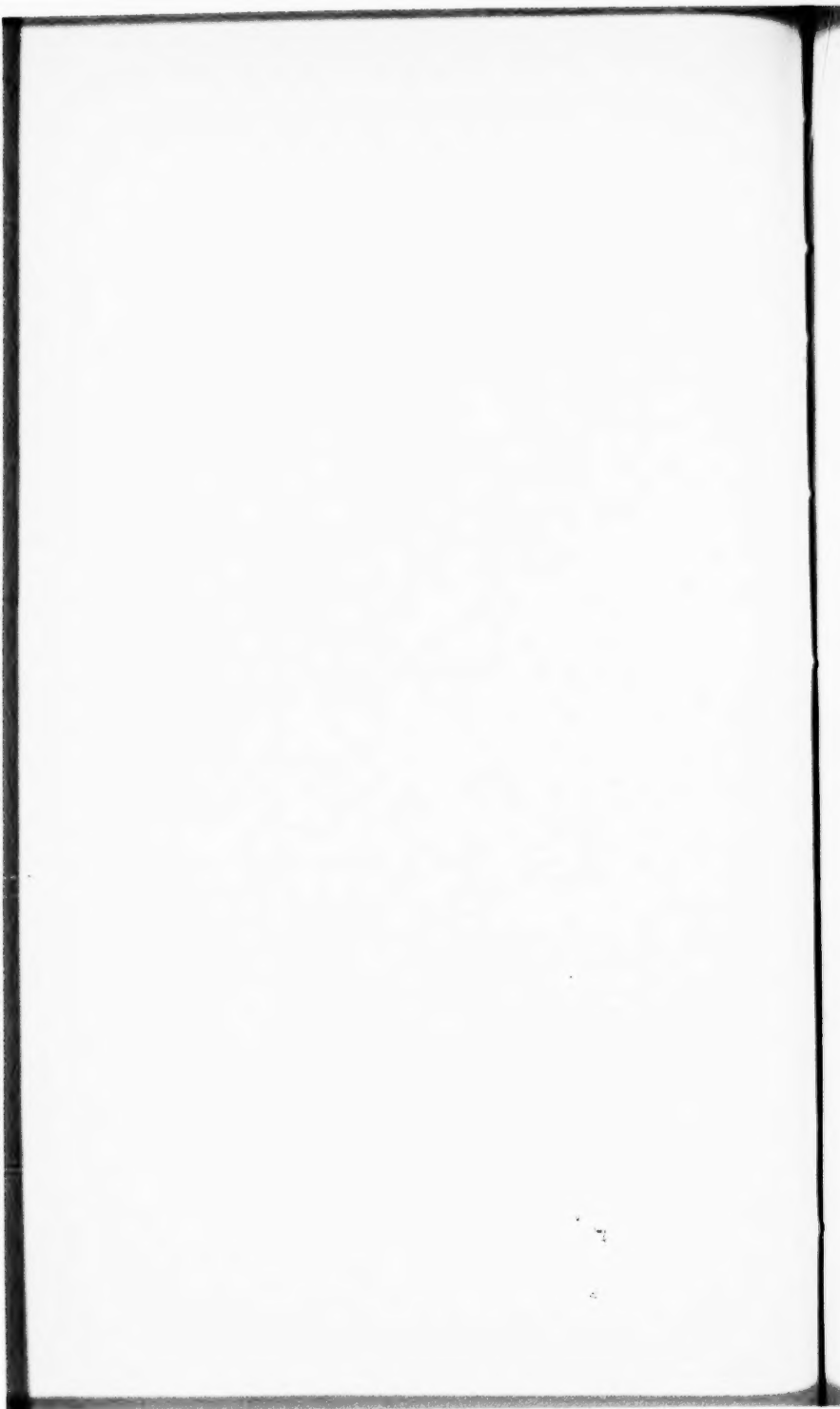
THE CONEY ISLAND AND BROOKLYN RAILROAD  
COMPANY ET AL.,  
*Appellees.*

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**BRIEF FOR APPELLEES.**

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WILLIAM N. DYKMAN,  
ARTHUR E. GODDARD,  
*Of Counsel for Appellees.*



## SYNOPSIS OF BRIEF.

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Page 1 Supplemental Statement.

" 3 Preliminary Points.

Equitable Jurisdiction not disputed.

The Income Tax Cases not questioned.

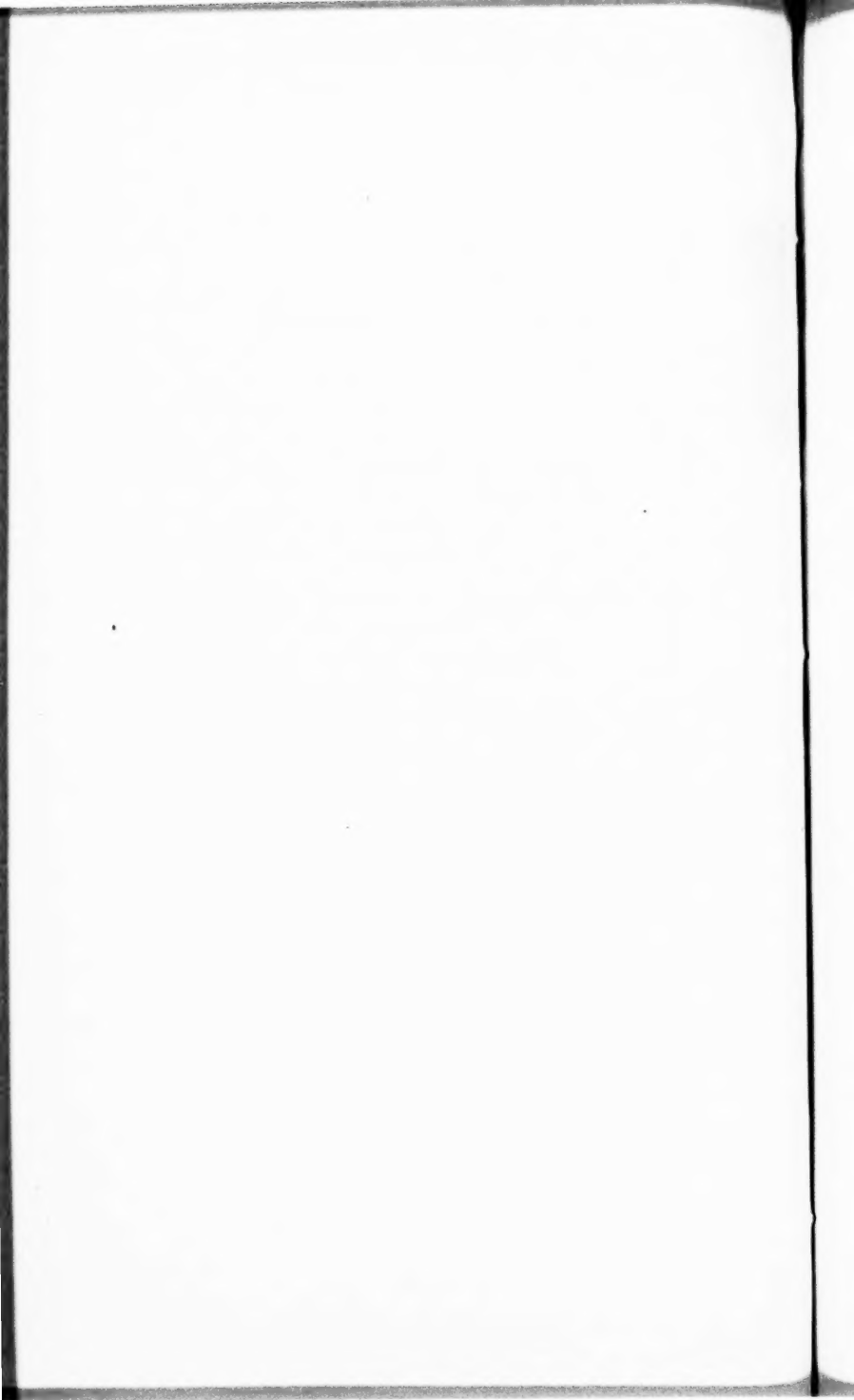
" 4 Point I. The tax is not an interference with  
the sovereign powers of states.

" 16 Point II. The tax, even if in some respects  
an income tax, is not a direct tax.

" 25 Point III. The tax is "uniform" and does  
not deprive of property without  
due process of law.

" 28 Point IV. A tax upon franchises or business  
of public service corporations is  
not an interference with govern-  
mental functions of the States.

" 32 Point V. The tax, even if unconstitutional in  
some respects, is valid in the  
main.



# Supreme Court of the United States,

OCTOBER TERM, 1909. No. 751.

WYCKOFF VANDERHOEF,  
Appellant,

v.

THE CONEY ISLAND AND BROOKLYN  
RAILROAD COMPANY, ET AL.,  
Appellees.

## BRIEF FOR APPELLEES.

The statement of facts in this case given in appellant's brief fairly sets forth the matters alleged in the bill of complaint in this suit, which must be taken to be admitted by the demurrer interposed by defendants Coney Island and Brooklyn Railroad Company, and its officers and directors.

The principal defendant, Coney Island and Brooklyn Railroad Company, hereinafter referred to as "defendant" is an electric street railway corporation incorporated under the laws of the State of New York and engaged solely in the business of carrying passengers for hire within the State of New York. It does not appear from the record in this suit, nor is it the fact,

that defendant performs any functions or duties of a public or municipal nature, other than those of an ordinary street railway company. It is under no contract with or obligation to the State of New York or any municipality or subdivision thereof, to transport troops, militia, or property for state or municipal purposes, except as it may be bound to accept such persons or property in its capacity as a private corporation engaged in the business of a carrier for its own profit and advantage.

Nor is it the fact, nor is it shown by the record in this suit, that defendant owns or holds any stocks, bonds or other evidences of indebtedness of any state or political or municipal division thereof, from which it derives any part of its income.

Defendant, through its officers and board of directors, believing the tax imposed by section 38 of "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, to be constitutional and rightfully imposed, and having been so advised by its counsel, announced its intention of filing the return required by Subdivision Third of section 38 of the Act and of complying with all its other provisions.

## PRELIMINARY POINTS.

### Equitable Jurisdiction.

As this suit is similar in nature and procedure to the Income Tax Case,

*Pollock vs. Farmers' L. & T. Co.* (157 U. S., 429),

it is assumed that this Court will entertain the appeal. No question, therefore, is raised as to the equitable jurisdiction of the Circuit Court or of this Court.

### The Income Tax Cases.

Whether or not this Court would modify or overrule its decision in the Income Tax Cases

*Pollock vs. Farmers' L. & T. Co.* (157 U. S., 429, 158 U. S., 601)

if the questions there considered were again presented, is an entirely unnecessary consideration in this case. Neither those cases nor their logical consequences and deductions are opposed to the validity of the present tax. In fact, the position of these appellees actually obtains support from the reasoning of both the prevailing and dissenting opinions in those cases.

No doubt in view of the difference of opinion among the learned Justices of this Court, and of the fact that none of the prior cases cited by the court were overruled except as to *dicta*, the authority of the decision in the Income Tax Cases will be limited strictly to the facts there presented, but even this, it is submitted, is not essential to sustain the validity of the tax in question.

The various objections set forth in appellant's specification of errors will be taken up, so far as possible, *seriatim*.

## POINT I.

**The tax in question does not involve an unconstitutional interference with the sovereign powers and functions of the states.**

At the outset it is to be noted that the tax is laid not only upon corporations but also upon *joint stock companies and associations* organized for profit and having a capital stock represented by shares.

The distinction between corporations and joint stock companies and associations is too well understood to require discussion here. The following cases clearly show these distinctions :

*Chapman vs. Barney* (129 U. S., 677).

*Peo. ex rel. vs. Coleman* (133 N. Y., 279).

*Phillips vs. Blatchford* (HOLMES, J.), (137 Mass., 510).

The fact that such joint stock companies and associations are taxed as well as corporations shows, of course, that it was not the intention of Congress to tax merely corporate franchises, *i. e.*, the rights of corporate existence derived directly from the States, but it is not necessary to rely upon the distinction between corporations and joint stock companies ; and *even if corporations alone* were included in the Act, the tax would not be an interference with the sovereign powers and functions of the State.

Counsel for appellant admit that this Court has never decided that Congress may not tax the corporate franchises of a State corporation. We agree ; and confidently predict that this Court never will make such a decision. Certainly there is nothing in the written Constitution of the United States to prevent such a tax ; nor is there anything in the unwritten implied restrictions upon the powers of the Federal Government arising from the dual nature of the system of government in this country. These restrictions have been carefully



guarded and upheld by this Court ever since its creation but they have properly been confined to matters which have to do with the *strictly governmental powers and functions of the several States*. On this point we need add nothing to the following abstract from a recent opinion of this Court written by Mr. Justice BREWER in the case of

*South Carolina vs. United States* (199 U. S., 437, 454, 459).

(page 459)

"It is also worthy of remark that the cases in which the invalidity of a Federal Tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government.

"In *Veazie Bank v. Fenno*, 8 Wall., 533, in which a National tax of ten per cent. on the amount of notes of any person, state bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of National taxation over state agencies (p. 547):

'It may be admitted that the reserved rights  
'of the States, such as the right to pass laws,  
'to give effect to laws through executive action,  
'to administer justice through the courts, and  
'to employ all necessary agencies for legitimate  
'purposes of State government, are not proper  
'subjects of the taxing power of Congress.'

In *The Collector v. Day*, 11 Wall., 113, cited *supra*, in the argument in favor of the exemption of the salary of a State judge from national taxation, is this language (p. 125):

'It would seem to follow, as a reasonable, if  
'not a necessary consequence, that the means  
'and instrumentalities employed for carrying  
'on the operations of their governments, for  
'preserving their existence and fulfilling the  
'high and responsible duties assigned to them  
'in the Constitution, should be left free and  
'unimpaired, should not be liable to be crip-

‘pled, much less defeated by the taxing power  
 ‘of another government, which power acknowl-  
 ‘edges no limits but the will of the legislative  
 ‘body imposing the tax. And, more especially,  
 ‘those means and instrumentalities which are  
 ‘the creation of the sovereign and reserved  
 ‘rights, one of which is the establishment of  
 ‘the judicial department, and the appointment  
 ‘of officers to administer their laws. Without  
 ‘this power, and the exercise of it, we risk  
 ‘nothing in saying that no one of the States  
 ‘under the form of government guaranteed by  
 ‘the Constitution could long preserve its exist-  
 ‘ence.’

In *United States v. Railroad Company*, 17 Wall., 322, an attempt was made to collect a tax on money due from a railroad company to the City of Baltimore. It was held that the City was a portion of the state in the exercise of a limited portion of the powers of the State and the Court said (p. 327) :

‘The right of the States to administer their  
 ‘own affairs through their legislative, executive,  
 ‘and judicial departments, in their own manner,  
 ‘through their own agencies, is conceded by the  
 ‘uniform decisions of this court and by the  
 ‘practice of the Federal Government from its  
 ‘organization. This carries with it an ex-  
 ‘emption of those agencies and instruments  
 ‘from the taxing power of the Federal Govern-  
 ‘ment.’

“And again (p. 332) :

‘We admit the proposition of counsel that  
 ‘the revenue must be municipal in its nature to  
 ‘entitle it to the exemption claimed. Thus, if  
 ‘an individual should make the City of Balti-  
 ‘more his agent and trustee to receive funds  
 ‘and to distribute them in aid of science,  
 ‘literature, or the fine arts, or even for the re-  
 ‘lief of the destitute and infirm, it is quite  
 ‘possible that such revenues would be subject  
 ‘to taxation. The corporation would therein  
 ‘depart from its municipal character and as-  
 ‘sume the position of a private trustee. It  
 ‘would occupy a place which an individual  
 ‘could occupy with equal propriety. It would  
 ‘not in that action be an auxiliary or servant of  
 ‘the State, but of the individual creating the

' trusts. There is nothing of a governmental character in such a position.'

In *Ambrosini v. United States*, 187 U. S., 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8) :

' The question is whether the bonds were taken in the exercise of a function strictly belonging to the state and city in their ordinary government capacity, and we are of the opinion that that they were, and that they were exempted as no more taxable than the licenses.'

These decisions, while not controlling the question before us indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

(The Court here proceeds to discuss numerous decisions of the State Courts showing the distinction between governmental and *quasi* private functions and instrumentalities of the States.)

(page 454) :

" More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government ?

" We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation ? If this extreme action is not to be counted among the probabilities,

consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

" Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National government."

In addition to the cases cited in the foregoing opinion as showing the distinction between the governmental and *quasi* private functions and instrumentalities of the State, may be cited a recent important case in the New York Court of Appeals.

*Matter of Rapid Transit Commissioners* (197 N. Y., 81.) The Court says, per VANN, J., at page 96 :

" 1. Was the action of the city in building the subway governmental or proprietary in character ?

" The city owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted to build and operate the road. It is authorized to lease its railroad, either for ' a specified sum of money or a specified proportion of income, earnings or profits ; ' or it may operate the road itself, and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers (§§ 27 and 30). In other words, the subway is a

business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign (*Maxmillian v. The Mayor*, 62 N. Y., 160 ; *Messano v. The Mayor*, 160 N. Y., 123 ; *South Carolina v. The United States*, 199 U. S., 437)."

Following the reasoning of the *South Carolina case* (page 459), this court would no doubt hold that even if the State of New York actually owned and operated the lines of the Coney Island and Brooklyn Railroad Company, the business so conducted by the State of New York would be subject to an excise tax imposed by Congress, and yet appellant claims that a mere private corporation operating the lines for its own profit cannot be taxed, because it holds a franchise from the State of New York !

If, as is claimed, Congress cannot tax corporations chartered by the States, and if this is one of the subjects of taxation over which Congress has no power, such as *exports*, then it must follow (*Fairbank vs. United States*, 181 U. S., 283), that the result cannot be accomplished in any manner, directly or indirectly, and whether or not individuals as well as corporations are included in the tax. That this is not the case is shown by the following, among other cases :

*Spreckels Sugar Refining Co. vs. McClain* (192 U. S., 397), (Tax on corporations and individuals engaged in the business of refining sugar).

*Thomas vs. United States* (192 U. S., 363), (Tax on sales of shares of corporate stock).

*Railroad Company vs. Collector* (100 U. S., 595), (Tax on earnings, dividends, interest, payments, etc., of railroad companies upheld, although individuals, of course, were not taxed).

*Pacific Insurance Co. vs. Soule* (7 Wall., 433), (Insurance Companies included in general income tax).

A further refutation of the claim that, because the States have the power to create, regulate and control corporations, therefore such corporations are not proper subjects of taxation by Congress is found in the

*License Tax Cases* (5 Wall., 462, 475), in which it was argued that since the State had the sole right to tax, control or regulate *intra-state business*, Congress had no power to impose excise taxes upon such business. It was held, however, at page 476:

"5. That the recognition by the Acts of Congress of the power and right of the States to tax, control or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for National purposes."

A similar argument was made in the case of

*McCray vs. United States* (195 U. S., 27), namely that the oleomargarine tax was an illegal interference with the internal commerce of the States. This court upheld the validity of the tax.

The cases upholding the validity of the Federal inheritance taxes, too, cannot be distinguished in principle from the present case, so far as sovereign rights of the State are concerned. In fact this Court says in the case of

*Plummer vs. Coler* (178 U. S., 115, 137):

"Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How., 490, in *Scholey v. Rew*, 23 Wall., 331, and in *United States v. Perkins*, 163 U. S., 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and *we*

*are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by State taxation is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance." (Italics ours.)*

It was held in these Inheritance Tax Cases that *for the very reason* that the States have absolute power and control over rights of inheritance and succession and in spite of the fact that such rights do not emanate from the Federal government, still they are proper subjects of taxation by Congress.

*Scholey vs. Rew* (23 Wall., 311).

*Knowlton vs. Moore* (178 U. S., 41).

*Plummer vs. Coler* (178 U. S., 115).

*Snyder vs. Bettman* (190 U. S., 249).

But it is claimed that there are cases in this Court which uphold the converse of this proposition and therefore this proposition is true "*unless*", as counsel for appellant well add (p. 28), "Congress can tax the franchise of a State railroad company but a State cannot tax the similar franchise of a railroad company chartered by Congress." This, we submit, is exactly the fact; Congress can tax the franchises of State corporations together with all other rights, privileges and other property within the jurisdiction and under the control of the several States (except exports) with the sole limitation, mentioned above, that Congress cannot tax certain property and instrumentalities considered necessary for the existence and proper governmental functions of the State. With the exception of this sole limitation, which is well defined in the *South Carolina case* (*supra*), the taxing power of

Congress is indeed searching and unlimited, reaching every subject within the territorial limits of the Union.

On the other hand what are the powers of taxation of the several States? Of course, they have the same limitation as to taxing the property and instrumentalities of the Federal government necessary for its existence and proper governmental functions, but further they have this very important limitation, namely, that as to subjects delegated by the Federal Constitution to Congress, the States may not interfere by regulation, taxation or other means. This limitation which, of course, has no application to the taxing power of the Federal government, covers a great number of subjects such as interstate and foreign commerce, the Federal postal system, patents and copyrights and other subjects delegated to Congress. It does not matter whether these subjects are made ordinary governmental functions of the Federal government by the delegation of such powers to Congress, or whether the limitation upon the taxing power of the States with regard to these subjects is a further one implied from the express provisions of the Constitution. In either case, the result is the same and clearly illustrates why cases concerning these matters delegated to Congress do not decide the converse of the question raised by counsel for appellant.

In fact no such "converse" cases *can* arise for it was established, as long ago as the case of

*McCulloch vs. Maryland* (4 Wheaton, 316), that Congress has power to grant corporate franchises *only* with regard to and in furtherance of the express powers delegated to Congress by the Constitution.

In every case in which it has been held, directly or indirectly, that a State may not tax a corporate franchise granted by Congress, it will be found that the real reason for this is not that the mere franchise as such is in part and parcel of the sovereign governmental instrumentalities of the federal government, but that



the functions, duties and operations of such corporations fall within the protection of the powers delegated to Congress, and therefore, are not subject to interference by the States.

In the very case of

*McCulloch vs. Maryland* (4 Wheat., 316),

Chief Justice MARSHALL pointed out this fact and showed the distinction between taxation by Congress and taxation by the States in the following language :

“ It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States will equally sustain the right of the States to tax banks chartered by the General Government. But the two cases are not on the same reason. The people of all the States have created a General Government and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents ; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves for the benefit of others in common with themselves. The difference is that which always exists, and must always exist, between the action of the whole on a part and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme.”

And, further, in the case of

*Osborn vs. Bank* (9 Wheat., 738),

the same great Judge in discussing and affirming the case of *McCulloch vs. Maryland*, shows still more clearly that it was not the mere fact that the Bank in

that case held a franchise from Congress which placed it beyond State powers of taxation, but the fact that its operations were in furtherance of one of the powers delegated to Congress. The language employed at page 862 is unmistakable :

" We do not maintain that the corporate character of the bank exempts its operations from the action of the state authorities. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

Also in the case of

*California vs. Central Pacific R. R. Co.* (127 U. S., 1),

so much relied upon by the appellant in this case, the franchise granted by Congress to the Central Pacific Railroad Company was granted for the purpose of carrying out the powers delegated to the Federal Government of regulating interstate commerce, providing for the transportation of the mails, etc. This appears from the opinion (page 39) :

" It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to

construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. \* \* \*

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens."

The distinction is further emphasized in the case of  
*Reagan vs. Mercantile Trust Co.* (154 U. S., 413),

which holds that a railroad corporation chartered by Congress is as to all matters relating to *intra state* business as distinguished from interstate commerce, subject to the full control of the State of Texas in the matter of taxation and regulation of rates.

The patent and copyright cases also cited by appellant's counsel fall within the same category: Since the right to provide for and regulate these matters was entrusted by the States to the Federal Government, the States, of course, cannot burden or interfere with patents or copyrights as such.

So far we have assumed that the tax is in reality a tax upon corporate franchises, because we believe that this court may well lay at rest, once and for all, the contention that a federal tax upon the franchises of State-chartered corporations is an unconstitutional interference with the sovereignty of the States. Such a contention, if sustained, might lead to disastrous results to the financial credit of the United States in view of the already great and fast increasing proportion of the business and property throughout the country held and controlled by corporations.

## POINT II.

**The tax in question, even in some respects an income tax, is not a direct tax within the meaning of the Constitution.**

We do not object to appellant's strenuous argument that the tax in question is in reality a franchise tax because as such it unquestionably would be valid, and further, because all arguments which show that it is a franchise tax also show that it is *not an income tax*. But, if counsel for appellant, abandon their first argument, as they seem to do in their learned brief (Point III), and seek to prove that this is an income tax, in spite of the fact that it expressly purports to be an excise tax upon business, they must go further and show that it is an income tax similar in nature and result to the tax held unconstitutional in the *Income Tax Cases*, for, of course, it was only that sort of an income tax which was held to be a direct tax.

Admitting that the present tax is an income tax, it is submitted that it is not a direct tax, either within the meaning of the constitutional provisions or within the decision of this court in the *Income Tax Cases*.

For even if a *general income tax*, covering the incomes of individuals, be held to be a direct tax, yet a tax upon the incomes of corporations and joint stock companies is essentially and fundamentally to be distinguished.

The right of a corporation to own and hold real and personal property, and therefore, of course, to receive the income thereof is, just as the corporation's very existence, a creature of the law entirely unlike the natural right of persons in general to own and hold property and receive its income. The Mortmain Statutes and the laws of many of the States, especially the earlier laws, expressly prohibiting or materially limiting the right of corporations to hold real estate

and to some extent personal property, are instances showing the artificiality of corporations' rights in this regard.

Such rights are certainly no less the favor and creature of the law than the right of inheriting property, and yet this court has held that a Federal inheritance tax need not be apportioned because it is not a direct tax on the property inherited, even if measured by the value of such property. How can it be held that a tax upon the right of a corporation to receive the income of property, even if measured by the amount of such income, is invalid because a direct tax upon the property which furnishes the income?

A joint stock company comes within the same rule as a corporation in this respect; although to some extent it is recognized at common law (inheritances, too, of course, are recognized at common law), it is subject to complete statutory regulation, which, as this court will judicially notice, has actually taken place in a large number of the States and in England (The "*Bubble Act*" and the later "*Companies Act*"). Certainly a joint stock company cannot be said to have an inalienable right to hold property when the States can pass laws at any time actually forbidding the creation of such companies or prohibiting them from holding property.

The following language from the case of

*Knowlton vs. Moore* (178 U. S., 41, 59),

is pertinent in dealing with the artificial rights of corporations:

"In legal effect, then, the proposition upon which the arguments rests is that wherever a right is subject to exclusive regulation by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National

government from almost every subject of direct and many acknowledged objects of indirect taxation."

We repeat also the following extract from the opinion in *Plummer vs. Coler* (178 U. S., 115, 137):

"Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How., 490; in *Scholey v. Rew*, 23 Wall., 331, and in *United States v. Perkins*, 163 U. S., 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations composed of individual persons and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And at all events, the mischief apprehended of impairing the borrowing power of the government by state taxation is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance."

The distinction between *natural rights* and those which are subject to the control and regulation of State laws and which may be called *privileges*, is well shown by the case of

*Nicol vs. Ames* (173 U. S., 509, 521), in which a Federal tax upon sales of property made at exchanges was in question. This court says, at page 521:

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there

offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by Government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

The foregoing proposition, *i. e.*, that a Federal tax upon the income of corporations is not a direct tax because it is rather an excise upon the artificial rights of corporations who hold property and receive income therefrom, than a direct tax upon the property, we believe to be of importance, since the Act now in question covers income from *all sources*, whether or not actually derived from business, and further appears to cover *all corporations* and joint stock companies, whether or not engaged in *active business* within the construction of some of the State statutes. Even all such income and even corporations not engaged in "active business" may, we submit, be taxed by Congress without apportionment for the foregoing reasons.

Nothing adverse to the contention that *all income*, whether or not actually derived from business, may be taxed under the present act is found in the case of

*Spreckels Sugar Refining Co. vs. McClain*  
(192 U. S., 379),

for in that case the tax was imposed upon individuals as well as corporations, and further, the statute then in question was so worded as to include only income derived from business. This court dealt only with the construction of the statute, the language of which was as follows :

" Every person, firm, corporation or company carrying on or doing the business \* \* \* of refining sugar \* \* \* shall be subject to pay

annually a special excise tax equivalent to one-fourth of one per centum on the gross amount of all receipts of such persons, firms, corporations and companies *in their respective business.*"

U. S. Stat., 1898, Chap. 448, § 27, 30 Stat. L., 464.

Even apart from the consideration that corporations and their rights to own and hold property are mere creatures of law and are therefore taxable as for a *privilege*, it is submitted that the tax in question properly covers entire income from all sources (except perhaps state and municipal stock and bonds, not involved in this suit) for the reason that it is an excise tax upon business, and that a permissible, although perhaps not a perfect measure of a tax upon corporate business, is the entire net income of the corporation.

Counsel for appellant claim that the tax in question is not a tax on business or occupation.

1st. Because individuals engaged in like businesses are not taxed ;

2nd. Because the tax is measured by a percentage of income from *all sources* ;

3rd. No specific kinds of business are specified but all kinds are taxed ;

4th. The tax covers the business of exporting.

Appellant's first objection is easily disposed of. The tax is a tax upon the *doing of business by corporations and joint stock companies*. Their right of doing business, apart from their right to exist and hold property, considered above, is distinct from the natural right of individuals in general to engage in business, just as the right to buy and sell property at an exchange is distinct from the general natural right to buy and sell property anywhere. A tax on the former is an excise tax on a privilege, while a tax on the latter may be held to be a direct tax on property.

*Nicol vs. Ames* (173 U. S., 509).

Corporations doing business have advantages in *doing business* over individuals. Practically their sole



object is, of course, the doing of business, and if they had not actual, practical advantages in this, would the expense of creating and maintaining corporate existence be undertaken in such a vast number of cases?

These actual, practical advantages were exactly what this court held taxable by an unapportioned excise tax in the case of *Nicol vs. Ames*, just cited.

Furthermore, the Federal government in the past has imposed taxes falling only upon corporation engaged in certain businesses, without the slightest suggestion or objection that the taxes were improper because not excise taxes on business.

*Veazie Bank vs. Fenno* (8 Wall., 533).

*Railroad Co. vs. Collector* (100 U. S., 395).

*United States vs. Railroad Co.* (17 Wall., 322).

Appellant's second objection, *i. e.*, that the tax in question is not a tax on business because income from *all sources* is taxed, is sufficiently answered by a number of decisions in this court. In many of these cases this court had under consideration State taxation which, of course, has far greater limitations than Federal taxation, not only because of the Fourteenth Amendment of the Federal Constitution, but also the Constitutions of many of the States themselves, some of which have comprehensive provisions covering the subject of taxation.

In all these cases the method of *measuring taxation*, especially with regard to corporations, because of the intricacy and delicacy of the subject and the inherent impossibility of reaching any perfect method of determining the proper measure, has been treated with great liberality by this court and only schemes which are substantially and manifestly unfair and illegal have been rejected.

Measuring excise or privilege taxes by *gross receipts* or net income from all sources, whether or not directly derived from the privilege in question, is an extremely common method and has frequently been upheld by this Court.

For instance, a State which, of course, has no power to tax receipts of a carrier derived from interstate commerce, is allowed to measure the receipts from *intra state* business which it may tax, by a proportion of the gross receipts of the carrier from all sources equal to the proportion of the mileage of operation within the State and the total mileage of the carrier.

*Maine vs. Grand Trunk Rwy.* (142 U. S., 217).

This measure of the amount of *intra state* business manifestly encroaches upon the revenues of interstate commerce even after the proportion is taken, for, if the carrier operates in say three or four States and they each tax a third or fourth of the total gross receipts, the entire gross receipts will finally be taxed and in this way the carrier will ultimately be taxed as if its entire business were conducted within the limits of each of the several States and as if *none* of its business crossed the lines of any one State!

Yet this measure of taxation is the usual one, and properly we submit, for the inconvenience and impracticability of determining the actual facts in such cases make an exact rule impossible.

Measures of taxation which approximate proper results have been upheld by this Court in the following cases :

*Provident Institution vs. Mass* (6 Wall., 611).

*Hamilton Co. vs. Mass.* (6 Wall., 632).

*Pacific Ins. Co. vs. Soule* (7 Wall., 433).

*State Railroad Tax Cases* (92 U. S., 575).

*Western Union Tel. Co. vs. Mass.* (125 U. S., 530).

*Bell's Gap Rd. Co. vs. Pennsylvania* (134 U. S., 232).

*Pullman Co. vs. Pennsylvania* (141 U. S., 18).

*Postal Tel. Cable Co. vs. Adams* (155 U. S., 688).

In the case of *Home Insurance Company vs. New York* (134 U. S., 594) a law of the State of New York

imposing a tax which purported to be a tax upon corporate franchises measured by the amount of dividends paid during the preceding year, was claimed to be in reality an income tax and to be invalid in so far as it included income from United States Bonds. It was held, however, that the tax although measured by dividends *derived from income* was what it purported to be, namely, a tax on the corporate franchises of the company and valid in its entirety.

The case of

*McHenry vs. Alford* (168 U. S., 651).

is also closely analogous. The act creating the territory of Dakota provided

"nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

The Northern Pacific Railroad owned large tracts of land within the limits of the territory of Dakota, granted to the railroad company by Congress and covered by general mortgages upon all the company's property. The territorial legislature imposed a tax upon this property, in lieu of all other taxes, measured by a certain percentage of the gross earnings of the road. With regard to the tax as imposed on these tracts of land, which appear to have been entirely vacant, this Court held that the lands could be taxed in a manner different from other lands because, by being included in the railroad mortgages, they had made possible the raising of money to build and operate the road, and further, because their *possible use* in connection with the road gave them a position different from that of other lands.

In the present case, it is submitted that the reasons for taxing income from all sources are much stronger than the reasons given in the case of *McHenry vs. Alford*, just cited.

All corporations which hold a substantial surplus use it in connection with their business in one way or

another, as security for mortgages and loans, for obtaining financial standing and credit by advertising the fact, and in other ways.

Corporations *must* have some business reasons for building up and maintaining such funds, and it is well known law, of course, that if they have no such reasons the stockholders can compel a distribution of the funds in dividends.

Finally the amount of income derived by corporations in general from property not used directly or indirectly in their business, is comparatively so insignificant, so difficult to determine, and would be the cause of so much litigation and uncertainty that we believe the measure of taxation selected in the present instance is by far the most convenient, satisfactory and fair that could have been determined upon.

Appellant's third objection to the tax, *i. e.*, that because all businesses are taxed therefore it is not a tax upon business, needs only to be stated to be rejected.

If any business or occupation may be taxed by the Federal government, is it necessary to ask whether all businesses or occupations may likewise be taxed ?

The instances of taxes upon business and occupations, imposed not only by the Federal Government but by the States themselves, are too numerous and too well known to require mention or citation, and appellant's argument that because in the past they have been imposed only upon certain specified businesses, therefore they may not be imposed in general, lacks force when it appears that the right to impose such taxes is not limited to any one class of business. If each may be taxed separately, all may be taxed together.

Appellant's fourth objection that the tax is invalid because it covers the business of exporting, is of course not sufficient to affect the general constitutionality of the Act. The objection has no application to the present case.

Counsel for appellant further object that with re-

gard to the circumstances in this case, the tax is really an income tax because defendant, Coney Island and Brooklyn Railroad Company, derives substantially its entire income from the use of real and personal property and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

The unsoundness of this objection is apparent. How many businesses are there of any sort which do not derive substantially their entire income from real and personal property in one form or another? Have not counsel for appellant forgotten that they must show that the tax in question is a *direct tax*, not *indirectly a direct tax*, nor *indirectly an income tax*, but a *direct tax upon real or personal property*?

### POINT III.

**The tax imposed by the Act is "uniform" and does not deprive any corporation or association of its property without due process of law.**

The only provision of the Federal Constitution (aside from the exception of exports) which limits the absolute right of Congress "to lay and collect taxes, duties, imposts and excises" for the purposes mentioned in Article I., Section 8, of the Federal Constitution, is contained in the same article and section in the following language :

"But all duties, imposts and excises shall be uniform throughout the United States."

*License Tax Cases* (5 Wall., 462, 471).

*McCray vs. United States* (195 U. S., 27, 50).

Appellant does not seriously contend that the tax is not "uniform throughout the United States." That

these words imply only geographical uniformity is so well settled by recent decisions of this court that it is necessary only to cite the following

*Head Money Cases* (112 U. S., 580).

*Knowlton vs. Moore* (178 U. S., 41).

*Patton vs. Brady* (184 U. S., 608).

The tax in question, of course, is geographically uniform within the decisions in these cases, since it applies with the same force and effect to corporations and joint stock companies in every State in the Union.

Counsel for appellant with great industry have collected and cited many cases and authorities supposed to deal with the subject of taxation in connection with the Fifth Amendment, which forbids the taking of property without due process of law. It will be found upon examination, however, that nearly all these cases deal only with taxation by the States under the far more comprehensive restrictions of the Fourteenth Amendment and their own Constitutions. It is the "*equal protection of the laws*" clause in the Fourteenth Amendment, which, of course, does not apply to the Federal Government, that has given rise to the numberless cases of "classification" for purposes of State taxation considered by this Court as well as the State Courts.

We might easily show that the present Act could be sustained under the more stringent provisions of the Fourteenth Amendment, or even under the Constitutions of practically all of the States, for the classification of the present Act, and its exemptions are similar to those contained in the provisions of nearly all the State tax laws (*Beers vs. Glynn*, 211 U. S., 477, 484-5); but that consideration is entirely beside the point, since the only provision relating to the Federal Government is that of the Fifth Amendment that "no person shall be deprived of property without due process of law."

To argue that the tax is invalid because it takes

property without due process of law, and then, when pointing out the want of due process, to claim that it results from the fact that the tax is invalid, is manifestly but to argue in a circle and to beg the question as well. If the tax is valid, there is, of course, no want of due process of law. If the tax is invalid, it must be for some defect in the tax *as a tax*. In this case the only possible defect would arise from the want of geographical uniformity, which is not claimed.

This whole subject received such careful and thorough consideration in the recent case of *McCray vs. United States* (195 U. S., 27, 50), that it would be superfluous to cite authorities here. We refer to the admirably clear and convincing opinion in that case, which is of too great length to be quoted adequately.

The remaining contentions of appellant's counsel that *equality* as well as uniformity are required of a Federal tax, irrespective of constitutional limitations, are unsustained by any authorities in this Court, except perhaps the *dicta* of Mr. Justice FIELD in the *Income Tax Cases*, which *dicta* were not concurred in by any other member of this Court, and which, it is respectfully submitted, are squarely opposed to the decisions in the cases of

*McCray vs. United States* (*supra*).  
*Patton vs. Brady* (184 U. S., 608).

In the latter case this Court's conclusion was concisely stated as follows by Mr. Justice BREWER at page 623 :

“ Geographical uniformity being therefore that only which is prescribed by the Constitution, the Courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final.”

The claim that excises must be *equal* and uniform, and be “ laid according to some rule of apportionment ”

as asserted in the case cited in appellant's brief (page 55), when applied to taxes imposed by the Federal Government, would set at naught the distinction of the Constitution between direct taxes and excises and further would make the provision that excises shall be "uniform throughout the United States" entirely meaningless.

#### POINT IV.

**A tax upon the franchises or business of State railroads or public service corporations is not an interference with governmental functions or instrumentalities of the States, and is valid.**

If there ever had been any doubt upon this subject we submit that it was finally settled by the decision and reasoning in the case of

*South Carolina vs. United States* (199 U. S., 437).

In that case it was held that if a state chose to enter into the business of selling liquors, whether nominally under the police power of the State or as a business enterprise, its agents and property employed in this business were subject to Federal taxation.

The very instance of public utilities, including railroads, if they should be taken over and operated by the States themselves, was used as an argument in sustaining the tax. The extract from page 454 of the opinion is so pertinent that we repeat it :

" More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely



therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National government."

The court then proceeded to examine numerous decisions of State Courts clearly showing the distinction between properly governmental functions of States and their *quasi private* functions, and concluded at page 463 as follows :

"Now, if it be well established, as these authorities say, that there is a clear distinction as

respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation?"

In addition to the cases cited by this Court in the *South Carolina case (supra)* is the recent important case in the New York Court of Appeals, involving a public utility in the form of a subway owned and constructed by the City of New York.

*Matter of Rapid Transit Commissioners* (197 N. Y., 811). The language used at page 96 is so clear and concise that we repeat it :

" 1. Was the action of the city in building the subway governmental or proprietary in character ?

" The city owns the subway and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted to build and operate the road. It is authorized to lease its railroad, either for ' a specified sum of money or a specified proportion of income, earnings or profits ' ; or it may operate the road, itself, and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers (§§ 27 and 30). In other words, the subway is a business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign (*Maxmillian v. The Mayor*, 62 N. Y. 160 ; *Messano v. The Mayor*, 160 N. Y. 123 ; *South Carolina v. The United States*, 199 U. S. 437)."

It may be added also that a Federal tax upon State-chartered railroad corporations was in question and sustained in the case of

*Railroad Company vs. Collector* (100 U. S., 595).

The reasons why the case of

*California vs. Pacific R. R. Co.* (127 U. S., 1) has no application to the case of a tax imposed by the Federal government were considered so fully above (Point 1, pages 11-15) that we shall not repeat them here.

The same reasons distinguish the case of a Federal tax upon a so-called public service corporation chartered by a State. The only reason that a railroad chartered by Congress is exempt from State taxation, so far as its franchise—its right to operate—is concerned, is that it fulfills duties and exercises powers expressly granted to Congress by the Constitution. These powers cause exemptions from State taxation in addition to the exemption of what would otherwise be the strictly governmental functions of the United States as a sovereign.

There is no such additional exemption, on the other hand, which limits Federal taxation. If the subject taxed does not fall within the one exemption, *i. e.*, of State agencies and instrumentalities "*of a strictly governmental character*" the tax is valid. That a public service corporation does not properly fall within this strictly governmental exemption, and the disastrous results to the National revenues and credit which might ensue if they were exempted, clearly appear from the *South Carolina* and other cases cited above.

## POINT V

**Even if the tax should be held unconstitutional in some respects, the main purpose of the Act, being clearly within the powers of Congress, should be upheld.**

Assuming, what of course is not in issue in this case, that the tax is invalid in so far as it covers income derived from State or municipal bonds and further, in so far as it covers the business or occupation of exporting, and, finally, in so far as it taxes the amount of income derived from real estate or invested personal property not actually employed in business, yet, it is submitted, these objections are not of sufficient importance with relation to the purpose and scope of the entire Act to warrant a decision that the provisions of the Act are not separable or that Congress would not have enacted the law if it had known of the unconstitutionality of these minor points.

In this, the case is entirely dissimilar from the *Income Tax Cases*, in which it was held that income derived from real estate and invested personal property and State or municipal bonds was so vitally *of the essence of the Act* that the tax could not be sustained as an excise tax on income derived solely from business or occupation, and therefore, the whole must fall.

In the present case, the Act is imposed only upon every corporation, joint stock company and association "*with respect to the carrying on or doing business by such corporation, joint stock company or association.*" Congress clearly had in mind, therefore, an excise tax upon the business done by corporations and associations and even if this court should hold that the

method of measuring the tax by net income from *all sources* is unconstitutional, yet it is submitted that income derived solely from actual business may properly be taxed under the present Act. Only in exceptional cases would the result thus obtained be substantially different from that intended by the exact terms of the Act.

WILLIAM N. DYKMAN,  
ARTHUR E. GODDARD,  
Of Counsel for Appellees.



**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1909.**

**No. 752. 410**

Office Supreme Court  
**FILED**  
**MAR 14 1910**  
JAMES H. MCKENNEY,  
Clerk

**FRANCIS L. HINE, APPELLANT,**

*vs.*

**HOME LIFE INSURANCE COMPANY ET AL.**

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

**BRIEF OF APPELLEES**

**IN SUPPORT OF THE CONTENTION THAT THE FEDERAL CORPORATION TAX LAW  
OF 1909, PROPERLY CONSTRUED, IS CONSTITUTIONAL.**

**WASHINGTON, MARCH 14, 1910.**

**WILLIAM D. GUTHRIE,**

**VICTOR MORAWETZ,**

**HOWARD VAN SINDEREN,**

*Of counsel for Appellees.*





# Supreme Court of the United States,

OCTOBER TERM, 1909. No. 752.

FRANCIS L. HINE, Appellant,

*versus*

HOME LIFE INSURANCE COMPANY,  
THOMAS H. MESSENGER, J. WARREN  
GREENE, H. E. PIERREPONT, THOMAS  
T. BARR, GEORGE E. IDE, WILLIAM  
A. NASH, JOHN F. PRAEGER, ELLIS  
W. GLADWIN, JOHN E. BORNE,  
WILLIAM M. ST. JOHN, JOHN S.  
FROTHINGHAM, MARTIN JOOST, E.  
LE GRANDE BEERS, COURTLAND P.  
DIXON, ANTON A. RAVEN, ROBERT  
B. WOODWARD, WILLIAM A. MAR-  
SHALL and WILLIAM G. LOW, JR.,  
directors of said company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF OF APPELLEES.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York, sustaining a demurrer interposed on behalf of the defendant Home Life Insurance Company and its directors and dismissing the bill. The controversy arises under section 38 of the act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes,"

approved August 5, 1909, c. 6, 36 Stat. 112. The suit is brought by the complainant, Francis L. Hine, as a stockholder and policy-holder, to enjoin the defendant company and its directors, from complying with the law. The facts are not in dispute, and are correctly stated in the bill of complaint and in complainant's brief at pages 4-8. The defendant and its directors were advised and took the position that the act of Congress, properly construed, was a valid exercise of the taxing power vested in Congress and was not unconstitutional as claimed by the complainant. The following brief is submitted in support of this position.

The Home Life Insurance Company is a life insurance company incorporated under the laws of the State of New York. It has a capital stock of \$125,000, and assets of approximately \$22,000,000. The company owns in fee real estate of the value of \$1,643,609; United States Government bonds to the amount of \$11,193; bonds of the State of New York to the amount of \$109,500; municipal corporate stock of the City of New York to the amount of \$102,160; bonds of other municipal corporations within the United States to the amount of \$53,800; bonds and stocks of solvent corporations incorporated under the laws of the United States or of one or more states, to the amount of upwards of \$10,000,000; and real estate bonds and mortgages to the amount of \$6,105,030 (record, fol. 3). The net income of the company for the year ending December 31, 1909, amounted to about \$450,000, and a large part of this income was derived from the securities hereinbefore mentioned (fol. 4).

The points submitted on behalf of the appellees are substantially as follows:

1. That the tax imposed by the act of August 5, 1909, is an excise and within the constitutional power of Congress.

2. That the act, properly construed, does not include a tax upon income derived from United States bonds, state, county or municipal securities, or income directly derived from real and personal property.

3. That if the act should be construed as taxing income derived from non-taxable securities, or from real and personal property, it would be unconstitutional, but that the invalid part of the tax would be severable, and that the tax would be valid and enforceable in so far as it imposes an excise tax upon income derived from the carrying on or doing business by corporations, joint stock companies and associations organized for profit and insurance companies.\*

# I.

## AS TO THE POWER OF CONGRESS TO LAY EXCISE TAXES.

The tax now under consideration is described in the act of Congress as "a special excise tax with respect to the carrying on or doing business." This declaration on the part of Congress as to the nature of the tax is, of course, entitled to great weight; and unless it was plainly erroneous, or merely a subterfuge, the declared purpose

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\* The text of the act of August 5, 1909, and of the Internal Revenue Regulations, together with a general discussion of its provisions, will be found in Machen on the Federal Corporation Tax Law recently published (Boston, Little, Brown & Company). The constitutionality of the law is also interestingly discussed by Professor Goodnow in the Columbia Law Review for December, 1909, by Mr. Hugh A. Bayne in the Outlook for January 1, 1910, and by Mr. John S. Sheppard, Jr., in the Harvard Law Review for March, 1910.

of Congress to impose an excise tax must be given effect. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 411.

The power to lay and collect excises is granted in express terms by the Constitution, and the only express limitation is that "excises shall be uniform throughout the United States." At this day, it is no longer open to question that a tax upon carrying on or doing business, or upon the net income derived from carrying on a business is an excise, and that Congress may impose such a tax. *Pacific Insurance Company v. Soule*, 7 Wall. 433, 443; *Railroad Co. v. Collector*, 100 U. S. 595, 598; *Springer v. United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 411; *South Carolina v. United States*, 199 U. S. 437, 454. Furthermore, after the decision in the *Income Tax Cases*, it was decided by this court that the constitutional limitation that excises shall be uniform throughout the United States prescribes merely geographical uniformity. *Knowlton v. Moore*, 178 U. S. 41, 83.

The nature of the tax is not affected by the fact that it is imposed only upon corporations, joint stock companies and associations organized for profit, and having a capital stock represented by shares, and upon insurance companies. If a tax applicable to individuals would be an excise within the meaning of the Constitution, a similar tax applicable to corporations and other joint stock companies, or to insurance companies, would be an excise; and, likewise, if a tax applicable to individuals would be a direct tax within the meaning of the Constitution, a similar tax applicable to corporations, joint stock associations, or to companies of any class, would be a direct tax.

The Constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is co-extensive with the power to tax individuals. Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that could not be imposed constitutionally upon individuals, and it cannot impose upon individuals an excise tax that could not be imposed upon corporations and other companies and associations; but Congress can impose a valid excise tax upon corporations, or upon companies or associations of any class, without including individuals, and it can impose such a tax upon individuals without including corporations, or other companies, or associations.

The appellants contend that the tax imposed by section 38 of the act of August 5th, 1909, is essentially a franchise tax and that Congress cannot impose a franchise tax upon state corporations as these are instrumentalities of the state governments. This argument appears to be the result of a confusion of ideas. The franchise to be a corporation, or to carry on business in a corporate capacity, certainly does not of itself render a corporation a governmental instrumentality or agency. The great majority of corporations, like ordinary partnerships, have been formed under general laws for purely private purposes. The argument that a state, by authorizing individuals to form a corporation, can exempt them from the power of Congress to impose an excise tax upon their private business does not require serious con-

sideration. There are special franchises which may be conferred by a state upon corporations or individuals to enable them to perform certain functions which could be performed by the state itself, as, for example, the franchise to condemn lands or to use the public streets and highways for the construction, maintenance and operation of railroads, gas works, water works, etc. Undoubtedly, railroads, gas works, water works and other public utilities, when owned and operated by the state itself, cannot be taxed by the United States Government, but it is well established that such public utilities, when owned and operated by private corporations, or by individuals for purposes of profit, are proper subjects of taxation. *Union Pacific R.R. Co. v. Peniston*, 18 Wall. 5, 31. If owned by the state, but operated by it as a business for profit, they would then come within the principle of the *South Carolina* case, *supra*.

It is true that an agreement of partnership can be entered into at common law without statutory authority, whilst corporate capacity, with its separate entity, succession and freedom from personal liability, cannot be so assumed under our system, and, therefore, may be said to be a right or privilege granted by statute. But at the present day the laws of the several states authorize the formation of corporations for any lawful business purpose, by executing and filing a certificate or articles of incorporation. If a state were to enact a law permitting partnerships to be formed only in a prescribed manner and upon paying a license fee, no one would seriously urge that this right constituted a special fran-

chise or privilege, which would exempt partnerships from federal taxation. In the case of the Coney Island and Brooklyn Railroad Company, No. 751, submitted with the case at bar, the defendant railroad company operates a railroad under a special franchise from the State of New York; but it is well settled in that state that such a franchise is entirely distinct and different from the so-called franchise to be a corporation. *City of New York v. Bryan*, 196 N. Y. 158, 163; *People v. O'Brien*, 111 N. Y. 1, 47. A federal tax on the franchise to condemn property and to operate a railroad in the State of New York might come within the ruling of the court in the case of *California v. Central Pacific Railroad Co.*, 127 U. S. 1. This case, however, did not overrule or qualify *Railroad Co. v. Peniston*, *supra*. On the other hand, a tax upon the mere exercise of corporate capacity, levied impartially and uniformly upon all corporations, would be essentially different.

The fact that the tax in question applies to all unincorporated joint stock companies and associations organized for profit, and having a capital stock represented by shares, indicates clearly that Congress did not regard the tax as a franchise tax. As is well known, there are many large joint stock associations in the United States that are not incorporated and that have uniformly escaped franchise taxes on that very ground. The large express companies are not incorporated. They are, of course, organized under the laws of a state, *e. g.*, New York, just as a partnership is organized under the laws of a state. Although such organizations possess some of the attributes of corporations and hence are properly classified with them for purposes

of taxation, as shown in *People ex rel. Platt v. Wemple*, 117 N. Y. 136, they are not vested with any franchise to be a corporation.

As Chief Justice Chase said in the *License Tax Cases*, 5 Wall. 462, 471: "The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." But a tax upon income derived from an occupation or business is not a grant of a license to engage in business, nor is it a regulation of business. When Congress, under the lead of Hamilton, imposed the first excise on the use of distilled spirits, it did not grant a license, or privilege, or franchise to manufacture or sell distilled spirits. Congress had no power to authorize the manufacture of liquor in the several states. A provision in an act of Congress prohibiting the distilling of spirits without paying a prescribed tax and imposing a penalty for violating the prohibition would be merely a means "necessary and proper for carrying into execution" the taxing power, as authorized by section 8 of Article I of the Constitution. When Congress taxes the manufacture or sale of tobacco, it does not do so under any power to regulate the manufacture or sale of tobacco, but solely under the power to levy an excise tax. *Patton v. Brady*, 184 U. S. 608. When Congress, during the War of the Rebellion, taxed any person, firm, or company publishing any newspaper, magazine, review, or other literary, scientific, or news publication (act of June 30, 1864, c. 173, sec. 114, 13 Stat. 280), it did not thereby attempt to interfere with the liberty of the press, or to regulate the publication of news, for it had no constitutional power to do so. When Congress has laid check



stamp taxes, it has not proceeded upon the theory that it had power to regulate, or to prohibit, or to authorize the drawing of checks on state banks. So also as to the federal stamp tax on sales of stock involved in *Treat v. White*, 181 U. S. 264; *Thomas v. United States*, 192 U. S. 363. When Congress taxed successions, it did not do so in the exercise of a power to regulate inheritances, but wholly in the exercise of its power to lay an excise tax upon transfers of the property of decedents. See *Knowlton v. Moore*, 178 U. S. 41, 59. When Congress taxed sales at exchanges, no one pretended that it had power to regulate dealings at exchanges, but it was recognized that transfers of personal property at exchanges were proper subjects of an excise tax. *Nicol v. Ames*, 173 U. S. 509, 519. Similarly when Congress imposes upon "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company," doing business in the United States, a tax equivalent to one per cent. of the net income derived from their respective businesses, this is merely an exercise of the power to impose an excise tax upon the income derived from the transaction of business.

It is further contended on behalf of the appellant that an excise tax imposed generally upon *all* businesses and occupations would be unconstitutional, but that a tax upon selected or enumerated businesses or occupations would not be unconstitutional. Stated in other language, the contention is that Congress may constitutionally lay an excise tax upon any number, however large, of different businesses and occupations, provided that the several busi-

nesses or occupations be described separately, but that Congress cannot impose a tax in general terms upon all businesses and occupations, because such a tax would be a direct tax. The mere statement of this proposition, if we correctly comprehend it, should be sufficient to refute it. The isolated expressions selected by counsel from decisions of this court do not support this proposition. There are numerous instances in which Congress has imposed excise taxes upon all businesses, trades and professions without enumerating them separately. Thus, in the act of August 5, 1861, c. 45, sec. 49, 12 Stat. 309, the tax was levied upon income derived "from any profession, trade, employment or vocation carried on in the United States or elsewhere"; the same language was used in the act of June 30, 1864, c. 173, sec. 116, 13 Stat. 281; so also in the act of March 3, 1865, c. 78, sec. 1, 13 Stat. 479, and in the act of March 2, 1867, c. 169, sec. 13, 14 Stat. 478. In the act of July 14, 1870, c. 225, sec. 6, 16 Stat. 257, the language was "income derived from any business, trade or profession carried on in the United States"; whilst in the act of August 27, 1894, c. 349, sec. 27, 28 Stat. 553, Congress reverted to the prior words, "any profession, trade, employment, or vocation." There is, of course, no ambiguity or uncertainty in the word "business," and the phrase "carrying on or doing business," and they are common forms of expression in tax laws: *e. g.*, *The Parker Mills v. The Commissioners of Taxes*, 23 N. Y. 242, and cases cited *infra*.

Another proposition advanced on behalf of the appellant is, that to impose a tax upon corporations and other joint stock companies or associations engaged in business with-

out imposing a similar tax upon individuals and ordinary partnerships is so unreasonable, arbitrary and discriminatory a classification that the tax must be declared unconstitutional. It is, of course, well settled that the states can tax corporations as a class without including individuals or partnerships, and also that the states may tax individuals and corporations at different rates. The argument that the tax should be declared unconstitutional and void because imposed only upon corporations and joint stock associations seems to be based upon the suggestion that such a classification for purposes of taxation is in violation of the Fifth Amendment of the Constitution, which provides that persons shall not be deprived of property without due process of law. In view of the fact that it has been held repeatedly that the taxation of corporations as a separate class is not in violation of the Fourteenth Amendment of the Constitution, it is difficult to perceive how an act of Congress taxing corporations as a separate class can be deemed to be in violation of the Fifth Amendment. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 410.

The grounds upon which state excise taxes imposed only upon corporations have been upheld by this court support equally the conclusion that Congress may similarly impose an excise tax upon corporations as a separate class. The court is so familiar with this proposition and with its own decisions on this point that we shall only cite the leading cases for convenience of reference: *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237; *Home Insurance Company v. New York*, 134 U. S. 594, 606;

*New York State v. Roberts*, 171 U. S. 658, 665; *Florida Central &c. Railroad Co. v. Reynolds*, 183 U. S. 471, 477; *Berea College v. Kentucky*, 211 U. S. 45, 54.

For similar reasons, the exemption of certain associations and corporations from the operation of the tax in the case at bar, does not render the tax unconstitutional. Congress can subdivide businesses for purposes of taxation, and it can impose an excise tax on certain kinds of business without imposing a similar tax upon other businesses. It is true that all corporations of the same class must be treated impartially and that a tax must apply uniformly to all corporations engaged in the same business under similar conditions, but the associations and corporations exempted from the tax imposed by the act of 1909 are essentially different in character from those that are subject to the tax. The associations and corporations that are exempted are not properly speaking engaged in "carrying on or doing business." At any rate, associations and corporations like those exempted by this act of Congress are exempt from taxation under the laws of nearly all the states. Therefore, this exemption was not arbitrary, unreasonable, oppressive, or capricious, and it should be sanctioned by the court. In fact, a comparison with the act of 1894 will show that the exemptions under that act were much more extensive than under the act of 1909, and there is no foundation in the case at bar for most of the criticism on this point of exemptions which applied to the earlier legislation.

## II.

THE PROPER CONSTRUCTION OF THE ACT OF CONGRESS OF AUGUST 5, 1909.

As this court has repeatedly pointed out, and notably in the recent decision in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, if an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. Mr. Justice White, delivering the opinion of the court in that series of important appeals, laid down the controlling rule as follows:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Comm.*, 211 U. S. 407."

The appellees, Home Life Insurance Company and its directors, submit that section 38 of the act of August 5, 1909, is susceptible of a construction which will avoid the grave and doubtful constitutional questions suggested in the numerous briefs filed on behalf of the

various appellants and will render the act clearly constitutional. According to this construction, the act imposes "a special excise with respect to the carrying on or doing business," to be assessed upon net income received "from all sources" in carrying on or doing business, but not upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act avoids any conflict with express or implied constitutional limitations.

The Constitution provides that direct taxes shall be apportioned and that duties, imposts and excises shall be uniform throughout the United States. A tax on the rents or income of real estate is a direct tax within the meaning of the Constitution (*Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 583), and a tax on the income of personal property is likewise a direct tax (*ibid.*, 158 U.S. 601, 628). A tax upon income of United States bonds, which by the acts of Congress pursuant to which they were issued are expressly exempted from United States taxes, would be unconstitutional and void, because impairing the obligation of contracts or taking property without due process of law (see below, pp. 24-26). A tax upon income derived from state, county and municipal securities is beyond the taxing power of Congress because in conflict with implied restrictions resulting from the fundamental nature of our Union composed of sovereign and indestructible states. *Income Tax Cases*, 157 U. S. at pp. 583 *et seq.*; 158 U. S. at p. 630. Mr. Chief Justice Fuller on the rehearing said:

"We have unanimously held in this case that, so far as this law operates on the receipts from municipal

bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution."

See also *Ambrosini v. United States*, 187 U. S. 1, 7.

An examination of the exact issues presented for decision in the *Income Tax Cases* of 1895 will show that those cases involved an income tax imposed on two trust companies under section 32 of the act of August 27, 1894 (c. 349, 28 Stat. 509), which read as follows:

"Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

It was this tax, as laid upon these two corporations, that was held to be partially a direct tax and, therefore, in violation of the Constitution, because not apportioned. No individual was before the court. Of course, the conclusion followed, *a fortiori*, that the similar tax imposed by section 27 of the same act as part of the same general scheme of taxation upon all citizens of the United States and upon all persons residing in the United States was likewise unconstitutional and void

in so far as it included a tax on the rents or income of real estate or on the income of personal property. But it was not held in either of these decisions that the act of 1894 was unconstitutional in so far as it applied to income derived from carrying on a business. On the contrary, it was conceded by counsel and recognized by the court that a tax on income derived from business or occupation would not be a direct tax but would be an excise. As Mr. Chief Justice Fuller said, in delivering the opinion of the court on the rehearing, 158 U. S. at p. 635:

“We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.”

It should be noted that section 27 of the act of 1894 (printed 157 U. S. at p. 434) specifically included not only a direct tax on income “derived from any kind of property, rents, interest, dividends, or salaries,” but also an excise tax “on gains, profits and income . . . derived . . . from any profession, trade, employment, or vocation carried on in the United States or elsewhere.” There can be no doubt that if the act of 1894 had merely imposed a tax on gains, profits and income derived by individuals from any profession, trade, employment, or vocation, or on net income derived by corporations from “the carrying on or doing business,” the act would have been unanimously upheld as a valid excise tax.

Congress has acted upon the decisions of this court in



the *Income Tax Cases*, and has proposed for adoption by the several states a Sixteenth Article of Amendment to the Constitution, to read as follows :

“Article 16. The Congress shall have power to lay  
 “and collect taxes on income, from whatever source  
 “derived, without apportionment among the several  
 “States and without regard to any census or enumeration.”

There is, therefore, now pending before the people of the United States a proposal of the same Congress that passed the act in question to amend the Constitution so as to permit Congress to tax without apportionment incomes derived from real and personal property. Congress accepted the construction of this court that certain income taxes, *i. e.*, taxes on income derived directly from real or personal property, were direct taxes. Congress has proposed to amend the Constitution simply by providing that direct taxes on income need not be apportioned as all other direct taxes must be. The purpose of the amendment plainly was to meet the decision of the court in the *Income Tax Cases*. There was no need of an amendment to enable Congress to impose excise taxes on incomes derived from the carrying on of a business or occupation by individuals, partnerships, or corporations. It had been settled by this court that a tax upon income derived from a business or occupation was an excise and, therefore, need not be apportioned. See cases cited in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397. The act of August 5, 1909, was passed within two weeks *after* the submission by Congress of this proposed amendment. Under these circumstances, it does not seem reasonable to assume that Congress intended by this act to

impose an income tax on the income of corporations which would be partly a direct tax within the decision in the *Income Tax Cases*.

We submit, therefore, that the words "from all sources" found in the act of 1909 must be deemed to relate to and to be qualified by the preceding words declaring the intention of Congress to impose "a special excise tax with respect to the carrying on or doing business," because otherwise it must be held that Congress intended, in defiance of the decision of this court in the *Income Tax Cases*, to impose a tax upon income derived from non-taxable securities and from real and personal property, and it must be held also that the action of Congress in proposing a Sixteenth Amendment to the Constitution was meaningless.

To construe the present act of Congress as not applicable to income derived from United States bonds and state securities, or to rents or other income derived directly from real and personal property, would be in accordance with the well settled rule of statutory construction that a general provision must be deemed limited by special statutory or constitutional provisions. Thus, the act of 1909 should be construed as limited by the special statute providing that United States bonds shall not be taxed. Again, the act of 1909 should be construed as subject to the constitutional limitation that bonds issued by the state governments shall not be taxable directly or indirectly by Congress. For the same reason, the act of 1909 should be deemed limited by the constitutional requirement that a tax upon income derived directly from real or personal property must be apportioned among the states. This

familiar rule of construction is illustrated by such cases as *Kepner v. United States*, 195 U. S. 100, 125, and *United States v. Nix*, 189 U. S. 199, 205.

If the statute be construed as imposing a tax only upon income derived from carrying on business, then income derived through the use of real estate and other property in carrying on business would be subject to the tax, though this real estate or other property, or income derived therefrom, could not be taxed directly; but income derived from investments in real estate or other property not employed in business would not be subject to the tax.

The test in each case is whether the income was received as direct income from property or as income from carrying on a business in which the property was used. Thus, rents of real estate collected from others could not be taxed except by a direct tax apportioned according to the Constitution, but income derived through the use of real property in carrying on a business could be taxed by an excise. A corporation owning real estate used in conducting its business, such as the plant of a manufacturing company, the hotel of a hotel company, the mines of a mining company, the right of way, terminals and yards of a railroad, or any other real estate employed in business and not leased to others, would be taxable by an excise tax; but rents collected upon any part of the real property leased to others would not be taxable except by a direct tax. Similarly, an excise tax could be imposed upon the income derived by a corporation from profits in its business of buying and selling real property, but not upon rents collected upon real property owned by the corporation and leased to others. Income

received by a corporation as interest on bonds owned by it or upon loans of moneys to others would not be taxable except by a direct tax, but a tax upon profits derived from carrying on the business of dealing in securities or loaning money on commission would be an excise tax.

The decision in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 416, is controlling upon this point. Mr. Justice Harlan there said :

“ But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business ; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration of the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged.”

The exclusion of income received as dividends upon stock of other corporations, &c., does not imply that no other deductions were intended by Congress. The exclusion of income received as dividends on stock

of other corporations was inserted in the act for the purpose of avoiding double taxation, in the case of holding companies whose whole *business* frequently is to acquire stocks. Congress presumably deemed it unfair to compel a holding company to pay a tax upon income derived from dividends of other companies which had already paid the tax, although as a mere question of constitutional power, Congress could have imposed such double taxation if it had seen fit to do so. There is, therefore, no force in the argument that the express exclusion of dividends implies that Congress contemplated or intended that this should necessarily be the only income to be excluded.

Under the laws of many of the states, which authorize the formation of corporations for any lawful business, corporations may be organized for the purpose of holding or dealing in the bonds and stocks of other corporations and for the purpose of holding and dealing in real estate. Innumerable corporations have been organized for these purposes, as is shown by the reports on file under the act of August 5, 1909. In New York, for example, such corporations may be organized under the Business Corporation Law, ch. 12, laws 1909, entitled "An act relating to Business Corporations, constituting Chapter Four of the Consolidated Laws." This statute authorizes the creation of "a stock corporation for any lawful business purpose or purposes," and under this provision many companies have been organized either to hold stocks or to hold real estate. So, in New Jersey, the statute authorizes the formation of corporations for any lawful purpose, and, as is well known, it was under this

New Jersey statute that the Northern Securities Company was organized in November, 1901, for the purpose of holding the securities of other corporations. *Northern Securities Company v. United States*, 193 U. S. 197.

If a corporation be organized for the purpose of carrying on the business of holding securities or real estate, there is no reason why it should not be subject to taxation upon that occupation or business, or upon the income derived therefrom, though the property with which it carried on its business might not be taxable as separate objects of taxation, and though individuals might not be similarly taxed. *People ex rel. Vandervoort, &c., Co., v. Glynn*, 194 N. Y. 387, 389. Hence, the reason why Congress inserted the provision in question, because otherwise holding companies would have had to pay on dividends collected, that being their sole or principal business purpose.

Although exceptions or exclusions are sometimes construed in such manner as to extend the general clause and make it more comprehensive than would otherwise be likely, this rule is not universal and should not be carried too far. Thus in *Baggaley v. Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 636, 638, Mr. Justice Lurton, speaking for the Circuit Court of Appeals, Sixth Circuit, among other things, said :

“ We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court

to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. *Tinkham v. Tapscott*, 17 N. Y. 141."

See also *Mullins v. The Treasurer of the County of Surrey*, 5 Q. B. D. 170, 173, 174, and *The West Derby Union v. The Metropolitan L. Assurance Society*, [1897] A. C. 647, 652, 655.

This rule is analogous to the rule which obtains in the case of provisos. These are often interpreted as not in any way limiting or extending the principal clause. *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 36, 37; *American Express Co. v. United States*, 212 U. S. 522, 534.

It may be suggested that the excise in question should not be regarded as a tax on income derived directly from property or non-taxable securities, but should be construed simply as a business or license tax measured by the entire net income whether or not derived from business; in other words, that the words "equal to" convert what otherwise would be a tax on income into something essentially different. This line of argument is said to find support or warrant in *Home Ins. Co. v. New York*, 134 U. S. 594; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, and *Horn Silver Mining Co. v. New York*, 143 U. S. 305. These cases, however, did not present analogous conditions. The right of a state to impose franchise or business taxes on corporations is based not alone on the taxing power

but on the power to regulate corporations and the right or privilege to carry on business in corporate form, which it may grant or withhold at its discretion, even arbitrarily. As the court declared in the *Home Ins. Co.* case (at p. 600): "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." But as later decisions of the court have made very clear, the cases above cited do not sustain the proposition that a state may impose an excise business tax measured wholly or partly by income from objects not subject to its power of taxation. *Galveston, Harrisburg, &c., Ry. Co. v. Texas*, 210 U. S. 217, 227; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30, *et seq.*; *Pullman Co. v. Kansas*, 216 U. S. 56, 70. Addressing himself to this very point in the *Texas* case, *supra*, Mr. Justice Holmes said:

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone."

Certainly, the act of 1894 declared unconstitutional in the *Income Tax Cases*, would not have become constitutional if Congress had simply inserted the words "equal to" or "equivalent to," or had declared that it was an excise. The court would have said, as Chief Justice Marshall said in *Brown v. Maryland*, 12 Wheat. 419, 444:

"It is impossible to conceal from ourselves, that this is varying the form, without varying the sub-



stance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

But if Congress had changed the act of 1894, so as to exclude income derived from real and personal property and to confine the tax to income derived "from the carrying on or doing business," whether of individuals, partnerships or corporations, this would have changed the substance and not merely the form of the statute by making the tax wholly an excise within the power of Congress instead of partly an excise and partly a direct tax.

The United States bonds referred to in the bill of complaint (fol. 3) and owned by the Home Company were issued under the act of January 14, 1875, 18 Stat. 296, and the act of July 14th, 1870, 16 Stat. 272. The latter provides as follows:

"Said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions."

On the face of the bonds held by the defendant company is the following:

"The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority."

It would be an impairment of this contract if the United States should now directly or indirectly tax either the principal or the interest on these bonds. Although the

Constitution *eo nomine* does not prohibit the United States from impairing the obligation of contracts, there ought to be no doubt that the provision of the Fifth Amendment against depriving any person of property without due process of law will be found sufficient. Chief Justice Waite, speaking for the court in the *Sinking-Fund Cases*, 99 U. S. 700, 718, used the following language :

“ The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.”

The dissenting opinions of Justices Strong, Bradley and Field were even more emphatic upon this point, and the same views were reiterated in *United States v. Union Pacific Railway*, 160 U. S. 1, 33, where Mr. Justice Harlan, in delivering the opinion of the court, quoted with approval the above extract from the *Sinking Fund Cases*.

The Treasury Department will find no difficulty in enforcing the act if it be now authoritatively construed as applying only to income derived from the carrying on or doing business and as not including income derived from United States bonds and other non-taxable securities or from real and personal property not employed in business. Under state laws imposing taxes upon the capital of corporations employed in business, it is often necessary to make similar inquiry into the character and use of their property. *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 46; *People ex rel. Chicago Junction, &c., Co. v. Roberts*, 154 N. Y. 1; *People ex rel. Niagara River Hydraulic Co. v. Roberts*, 30 A. D. (N. Y.) 180, affd. 157 N. Y. 676; *People ex rel. Fort George Realty Co. v. Miller*, 179 N. Y. 49; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119; *Coal & Mining Co. v. Ladd*, 160 Mo. 435; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *In re Alabama R. Co.*, 1 Fed. Cas. 271; *Oakland Sugar Mill Co. v. Wolf Co.*, 118 Fed. Rep. 239; *Gilchrist v. Helena, &c., R. Co.*, 47 Fed. Rep. 593.

### III.

#### AS TO SEVERABILITY.

Even though the court should hold that the words "from all sources" must be construed as including income derived directly from non-taxable securities and from real or personal property as well as income derived from carrying on or doing business, and that the tax is unconstitutional as to income derived from non-taxable securities and from real or personal property, it does not follow that the entire

tax must be declared unconstitutional and void. On the contrary, the tax may be held invalid in so far as it is unconstitutional, and it may be upheld and enforced in so far as it is a valid excise upon income derived from "the carrying on or doing business."

The rule applicable to a case of this character was stated forcibly in the very recent case of *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 96. Mr. Justice Day, in delivering the opinion of the court, among other things said :

"It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Furthermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."

The amount of income derived by corporations from investments in United States, state, county and municipal securities and in real and personal property, must be small in comparison with the net income derived from the carrying on of business. It is a matter of common knowledge, capable of being verified by reference to public records in the various states and to the reports of the Census Bureau, that comparatively few corporations derive a large part of their net income from investments, dividends from stock not being included. A comparatively small amount of the income of the four hundred thousand corporations subject to the tax is derived from non-taxable securities or from sources that can be reached only by a direct tax. For

example, the Coney Island and Brooklyn Railroad Company, defendant in No. 751, derives substantially its entire income from its railroad business (fol. 9).

The court will recall that the act of 1894, construed in the *Income Tax Cases* (157 U. S. 429; 158 U. S. 601), differed materially from the act of August 5, 1909. In the former act, there was a general scheme of taxation imposed at the same rate on individuals, partnerships and corporations. The tax was imposed upon income derived by individuals "from any kind of property, rents, interest, dividends or salaries" as well as upon income derived "from any profession, trade, employment, or vocation," or "from any other source whatever." It was evident that income from real and personal property constituted the largest part of the anticipated revenue, and that if this were eliminated, it "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor" (158 U. S. at p. 637). The court declared that it could "not believe that such was the intention of Congress," and, considering the scheme of taxation as a whole, it was held that the valid part, that is, the excise tax "on business, privileges, employments, and vocations," could not be separated without re-writing the act and giving it an operation which no one could reasonably say had been intended by Congress.

The act of 1909 is entirely different. It does not purport to impose both a direct tax and an excise tax as inseparable parts of one whole scheme. On the contrary, it plainly declares the purpose to be to lay only an excise tax.

If Congress had been advised that it could not tax income from United States bonds, state, county and municipal securities, or from real or personal property not employed in business, and that the tax would fail to that extent, it is probable that the act of 1909 nevertheless would have been passed in its present form. There is no necessity to re-write this statute in any particular. It is only necessary to hold that the excise tax therein provided for applies only to income from all sources subject to an excise and does not include income not taxable by the national government, or derived from property that could not be taxed except by apportionment among the states. The language of this act ought not to be construed as evidencing an intention on the part of Congress to impose a direct tax and also an excise tax, as was done in the act of 1894, in the teeth of the declaration of Congress of its purpose to impose only "a special excise tax with respect to the carrying on or doing business by such corporation."

The reasoning of Mr. Chief Justice Fuller in the *Income Tax Cases* seems to us conclusive in favor of the contention that the unconstitutional part of the tax now under consideration is separable, and that the tax may be enforced as an excise imposed only upon net income derived from all sources in the carrying on or doing business. See also as to severability: *Allen v. Louisiana*, 103 U. S. 80, 84; *Huntington v. Worthen*, 120 U. S. 97, 102; *N. Y. Central, &c., R.R. v. United States*, 212 U. S. 481, 496; *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 96, *supra*.

## CONCLUSION.

For the reasons stated above, it is submitted that the act of August 5, 1909, properly construed, is not in conflict with or repugnant to any express or implied constitutional limitation, and that the judgment of the court below should, therefore, be affirmed.

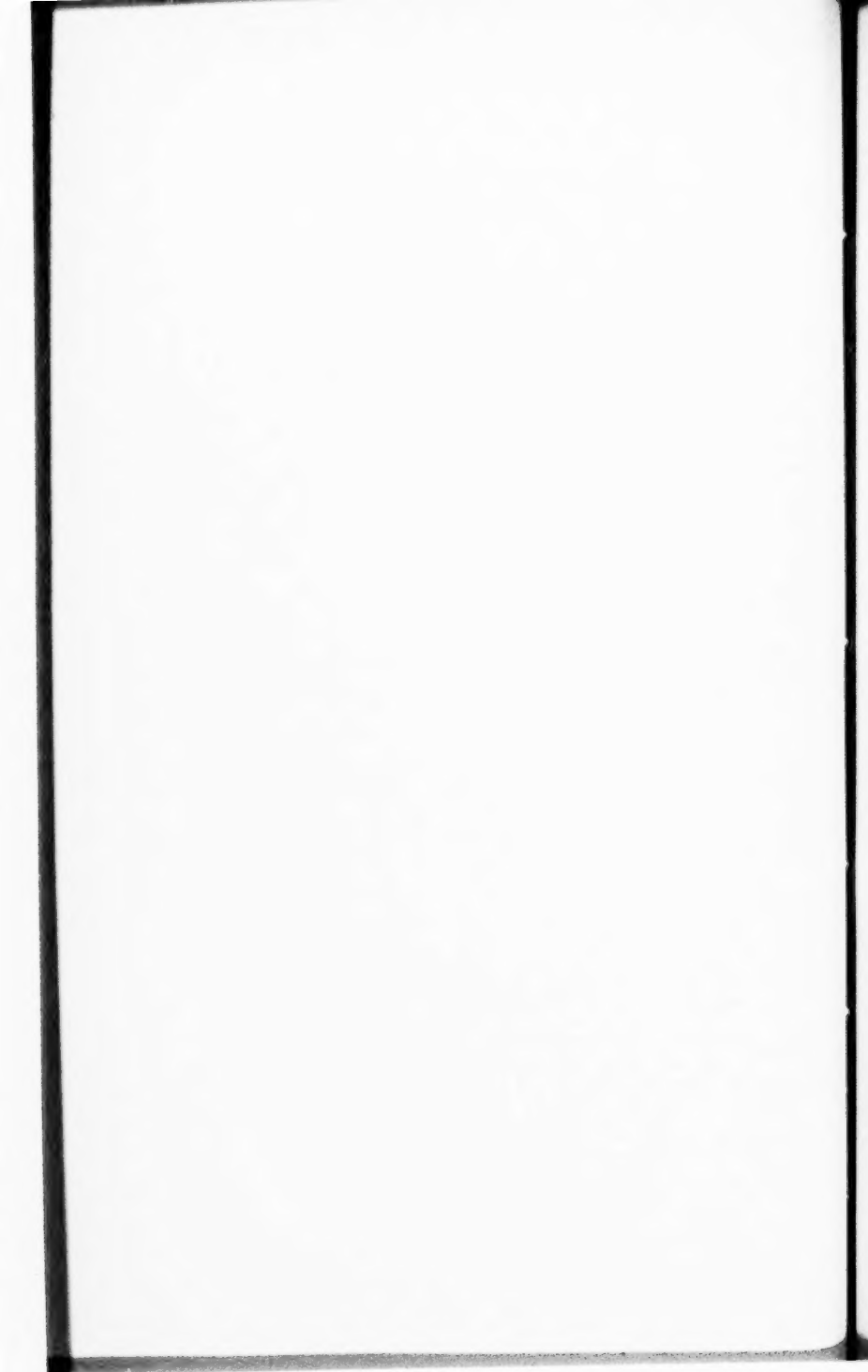
Washington, March 14, 1910.

WILLIAM D. GUTHRIE,

VICTOR MORAWETZ,

HOWARD VAN SINDEREN,

Of counsel for appellees.





MAR 18 1910

JAMES H. MCKENNEY,  
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~2~~ 410

FRANCIS L. HINE, APPELLANT,

*vs.*

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF  
NEW YORK.

BRIEF OF APPELLEES IN REPLY TO ARGUMENT  
FOR THE UNITED STATES.

WILLIAM D. GUTHRIE,  
VICTOR MORAWETZ,  
*Of Counsel for Appellees.*

WASHINGTON, March 18, 1910.



# Supreme Court of the United States.

OCTOBER TERM, 1909.

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**No. 752.**

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FRANCIS L. HINE, APPELLANT,

*versus*

HOME LIFE INSURANCE COMPANY ET AL.

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## **Brief of Appellees in reply to argument for the United States.**

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We agree with counsel for the United States that Congress has power, as in the act of August 5, 1909, to treat corporations and unincorporated joint-stock associations organized for profit, etc., and insurance companies as a separate class for purposes of taxation by imposing upon them a business tax not applicable to individuals or partnerships. We agree also that the exemption of certain corporations and organizations not organized for profit or to carry on business was reasonable and proper. In this respect, the act of 1909 differs from the act of 1894, where, for example, the exemption of *mutual* insurance companies, while *stock* insurance companies were taxed, withdrew and freed from the burden of the tax

over \$1,000,000,000 of investments in the State of New York alone.

However, we differ with the counsel for the United States in regard to the power of Congress to levy an excise business tax measured partly by income derived from business and partly by income derived from non-taxable securities and real and personal property.

## I.

The argument of the United States is that as Congress has constitutional power to impose upon every corporation, joint-stock company, or association of the character described in the act of 1909 "a special excise tax with respect to the carrying on or doing business," it may measure the tax by the entire net income, including not only business income from all sources, but also income derived directly from investments in property, such as interest on United States, state, and municipal bonds, rents of real estate leased to others, and interest, dividends, etc., derived from other investments. This contention is based principally upon the proposition that corporations and joint-stock corporations organized for profit are necessarily organized for a business purpose, and, hence, that all their property, of whatever kind or nature, and however held or employed, must be deemed to be held for business purposes and used in business.

From these premises, the conclusion is drawn that any tax upon the income of a corporation or joint-stock association is in its nature essentially and always an excise on business. The proposition will, perhaps,

be best stated in the language of the brief for the United States, as follows (p. 42):

“Indeed, as to both capital and surplus, a corporation (formed for profit and therefore for the conduct of a business described in its charter) *has no right to hold any property except for the purposes of the business*, and therefore as business assets. It cannot legally be a mere proprietor of property unconnected with the business. An attempt by the corporation to hold extrinsic property would be an abuse of its charter, and expose it to forfeiture of that charter. No corporation can claim that it holds property in any other way than as business assets, when it has no right so to hold property. It is legally estopped from questioning the business character of its assets.”

The learned counsel then proceed to argue, in substance (pp. 43, 44), that for the same reasons unincorporated joint-stock associations and insurance companies may likewise be treated by the *National Government* as not entitled to hold any property whatever except as used in their respective businesses and as estopped from questioning the business character of their assets.

But, in making this suggestion, the learned counsel of the United States must have overlooked the fact that the court held in the *Income Tax Cases* of 1895 that a tax on income derived by corporations—namely, The Farmers' Loan and Trust Company and The Continental Trust Company—from municipal bonds and other property, real or personal, was a direct tax, and that it was this feature that invalidated the act of 1894.

If, as now suggested, a tax on the net income of corporations, etc., is essentially an excise, even though the income be derived partly or wholly from non-taxable securities, or property only taxable by the rule of apportionment, then the decisions of 1895 were erroneous, and everybody at that time wholly overlooked the real point involved; for according to the position now taken by counsel for the United States the tax was wholly an excise and not, as held by the court, partly a direct tax and partly an excise. It has now been discovered for the first time that, after all, the tax under the act of 1894 was wholly an excise business tax, because every dollar of income of every corporation must necessarily be deemed income derived from carrying on business. In other words, the suggestion is that the court and all the counsel failed to perceive that the true rule is that any tax upon the income of a corporation, joint-stock association, unincorporated company, or, indeed, partnership, is in its essence a business tax, whether or not the income be derived directly from non-taxable securities or other property not actually used in business, simply because every partnership, company, association, or corporation is organized for the purpose of carrying on or doing some business.

It should be observed also that if the argument now advanced on behalf of the United States be sound, many of the decisions of the court sustaining excise taxes on corporations have proceeded on entirely erroneous reasoning. The recent case of the *Spreckels Sugar Refining Company* is an example (192 U. S. 397, 410, 417). The company in that case was organized for the purpose of carrying on or doing "the busi-

ness of manufacturing sugar," and had no other business. According to the present view of the Government, the company could not legally have been "a mere proprietor of property unconnected with the business," as "no corporation can claim that it holds property in any other way than as business assets when it has no right so to hold property," and the tax was to be "equivalent to" a percentage "of *all receipts* of such persons, firms, and corporations and companies *in their respective business*." Yet, the court held in that case that income derived from property "wholly distinct from the business of refining sugar" was not taxed, and failed to appreciate that the Spreckels Company was "legally estopped from questioning the business character of its assets."

Moreover, the court will not fail to notice that if a business excise on corporations or joint-stock associations may be measured by income derived from non-taxable property, the same rule must apply to individuals and partnerships, for the taxing power of Congress is the same. The result of the Government's contention must, therefore, be that Congress may impose upon individuals and partnerships a business excise on every business, profession, trade, employment, or vocation carried on in the United States or elsewhere, and measure that tax by the whole wealth of the individual or partnership. Under this view, the act of 1894, section 27, could have been sustained as to 99 per cent of its operation by simply treating it as an excise *equivalent to* two per cent of the "income derived from any profession, trade, employment, or vocation." Probably not over one per cent of the property-owners

of the United States are engaged in no profession, trade, employment, or vocation. But, in any view, according to the present argument of the Government, Congress had only to change slightly the wording of sections 27 and 32 of the act of 1894 to transform what the court had declared to be *mostly* a direct tax into wholly an excise.

## II.

We concede that the courts cannot interfere with the discretion of Congress in the exercise of the taxing power and that the courts cannot declare a tax unconstitutional because burdensome, even though it be so high as to become destructive in its effect. If any point of constitutional law has been settled, that point ought to be no longer open. *McCray v. United States*, 195 U. S. 27. In these respects, the power of the legislative branch of the Government is subject only to the requirement that direct taxes must be apportioned, that duties, imposts and excises must be geographically uniform, and that a tax law must operate equally and impartially on all of the same class similarly situated.

But if Congress should select a certain profession for taxation, as, for example, that of lawyers (in 1861, 1864, 1865, 1867, 1870, and 1894 every profession was included), then we assert that it cannot provide that every lawyer shall pay an occupation tax measured not by income derived from the practice of his profession, but by income derived from his private fortune; in other words, we assert that an occupation tax cannot be measured by the wealth of those engaged in the occupation. Congress may impose upon lawyers



a fixed occupation tax payable by all alike, or a tax measured by a percentage of professional income, but it cannot impose upon lawyers an occupation tax measured by income drawn from their private fortunes. The same reasoning applies to all trades, employments and vocations comprised in the generic term "business."

Let us suppose that Congress had selected the business of carrying on a hotel, or manufacturing tobacco, or publishing periodicals, or distilling spirits: could the tax in any such case be measured not by the income derived from the business or the capacity of the plant, but by the income derived by the owner from all his property, in other words, by his entire wealth? Would not such a measure be obviously unfair? Would not such a tax be as invalid as a business tax measured by size or color of those engaged in the business, or by mile posts, or by any other fanciful, capricious, and arbitrary standard? The court would again declare, as Mr. Justice Brewer declared in the now leading case of *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 154:

"The State \* \* \* may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

See also *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56 and *Southern Railway Co. v. Greene*, decided February 21, 1910.

### III.

In support of our contention that the correct construction of the act of 1909 is that the tax is to be measured by net income derived "from all sources" in "the carrying on or doing business," without including income derived directly from non-taxable securities or other property not used in carrying on or doing business, it will be convenient to refer to a few passages from the brief for the Government, the significance of which might otherwise be lost sight of. The candid concessions on behalf of the Government tend to narrow the questions to be considered by the court. Thus, the learned counsel state as follows, at page 29:

"A tax upon business is not a tax imposed upon property 'solely by reason of its ownership;' for, if the property is not put into business use, no tax falls upon it or its income."

At page 36:

"No tax is imposed in any way or on anything unless business is actually done. The statute lays the tax in terms 'with respect to the carrying on or doing business,' whether by a corporation, or joint stock company, or insurance partnership."

Again, at page 40 we find:

“(a) Obviously, the words ‘all sources’ in the act mean, so far as they relate to property rather than activities of the business, such property as is engaged in or connected with the business. In other words, they relate only to what may be described generally as ‘business assets.’ Such is the natural and perhaps unavoidable result of the statement of the statute that the tax is laid ‘with respect to the carrying on or doing business’ by the corporation, joint-stock company, or insurance company. It would be unnatural, even though permissible, to measure a tax ‘with respect to the carrying on or doing business’ by consideration of income from other than business assets, even in case of a business done by an individual or a partnership; and a corporation or joint-stock company, as will soon be argued, has no property which is not legally and practically an asset of the business. Beyond this, if the constitutionality of the statute be dependent in any way upon exclusion of income from other than business assets in the computation of the net income which measures the tax on business, that necessity is in itself a sufficient and controlling reason for interpreting the language of the statute, viz., these words ‘all sources,’ in a way that will make the statute constitutional rather than unconstitutional. No citation of authorities is necessary on that point. Such authorities abound, and are but particular illustrations of the unquestioned maxim—*Benignae faciendae sunt interpretationes chartarum, ut res magis valeat quam pereat.*”

And the same concession is repeated at page 150, as follows:

“Yet it is entirely possible to construe the words ‘net income received from all sources’ as relating only to income derived from property actively employed in the current operations of the business. That construction can be gathered not only from the rule that Congress must be taken to have intended what is constitutional, but also from the express statement of the statute that the tax is laid on companies ‘organized for profit,’ and is laid specifically ‘with respect to the carrying on or doing business.’ ”

In construing the words “from all sources” to mean “from all sources in carrying on or doing business,” we are following “what is sometimes known as Lord Tenderden’s Rule, that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*” (Mr. Justice Brewer in *United States v. Metcalf*, 215 U. S. 26, 31). This is but an application of the general principle of interpretation and construction, *noscitur a sociis*.

#### IV.

The various cases before the court serve to show how the act of 1909 would operate if construed so as to eliminate income from non-taxable securities and income derived directly from investments, which can be taxed only by a direct tax apportioned among the states.

No. 753, the case of the Northern Trust Company of Illinois, presents somewhat the same situation as the cases of Pollock and Hyde against the New York trust companies in 1895 (157 U. S. 429). The net income of the Northern Trust Company amounts to more than \$205,000 per annum. Of this about \$9,000 represents income and rents derived from real estate and \$50,000 interest on municipal bonds (record in No. 753, fol. 3). Deducting these items, the net income subject to the tax is \$146,000.

In 757, the Park Realty Company owns real estate in the city of New York, and on this property a hotel, known as the Hotel Leonori, has been erected, which has been leased at a fixed annual rental of \$55,000 (record in No. 757, fol. 6). The company has no other income than the rental of this real estate. If the property were owned and leased by an individual or partnership a tax on these rents would be indisputably a direct tax. It is no less a direct tax because the property is owned by a corporation which leases the hotel to an individual, who carries on the business of keeping a hotel. If it had been leased to a corporation, the corporation would have been liable to pay the present tax on that business.

In 784, the case of the Broadway Realty Company, a different situation is presented. It may be that that company is engaged in the business of managing an office building, and that its income is the product of that business, just as the income of a hotel-keeper from renting rooms would be the product of the business of keeping a hotel.

In 800, it does not appear for what purpose the Clark

Iron Company was incorporated. The bill of complaint merely shows that it is a Minnesota corporation and entitled to own and hold real estate within that state (record in No. 800, fol. 3). However, it does appear that the company leases its ore lands to other parties, and that the lessees carry on the mining operations. The income of the company is derived from rents and royalties resulting from the mining operations or business conducted by its lessees. Probably, there is no difference between its ownership as lessor and the ownership of an individual or partnership, but the case may have to be decided on its particular facts, as the actual operations of the company may constitute the carrying on of a business, and thus be differentiated from the simple case presented in 757.

In 819, it appears that the Boston Wharf Company, a Massachusetts corporation, carries on the business of dockage and wharfage (record in 819, fol. 3), and presumably was organized for that purpose. It has real estate of the value of \$5,000,000, and so far as appears all of it is employed in its business. The net income derived from dockage and wharfage will, of course, be income derived from the carrying on or doing business, even though the plant be wholly real estate, just as the net income of a hotel, a manufacturing company, or a railroad may all be derived from the use and employment of real estate *in carrying on or doing business*.

The position of an owner who leases real property to another at a rental, as in No. 757, is entirely different from that of an owner who himself uses his real estate in the conduct of his business.

## V.

The brief for the United States refers in various places to the practicability of separating any part or application of the statute which may be found unconstitutional, and the point is discussed at length at pages 169 *et seq.* With this view, we agree, and the rule is nowhere more emphatically stated than in the quotation from *Field v. Clark*, cited on page 170.

It is only necessary to add that the well-informed representatives of the Government state that only a comparatively small part of the income of companies engaged in business for profit is of a kind to which the objections reach (pages 171, 172), and that the effect upon the total revenue will be insignificant (page 173), although, of course, it may be of vital importance in isolated cases. There seems to be no reason for doubting that if the tax of 1909 be now authoritatively construed as measured only by net income from all sources in carrying on or doing business by corporations and unincorporated joint stock associations and insurance companies, no practical difficulty will be found in ascertaining the net income derived from business, or in excluding income derived from non-taxable securities or only taxable by Congress under the rule of apportionment.

In our principal brief we suggested that the decree of the Circuit Court should be affirmed, rather than reversed, as in the original hearing in the *Income Tax Cases*. We made this suggestion because, according to our contention, the act properly construed imposes a

constitutional tax. The amount of the non-taxable income cannot be satisfactorily determined from the record in our case or, so far as we can judge, from the records in most of the cases to be submitted at the same time. As is suggested in the brief of the United States, the true answer must be given on the special facts of each case (p. 58). The court may well conclude to affirm even if the statute be held to be partly unconstitutional, and leave the several companies to pay under protest any amount which they claim is based on non-taxable income. To avoid injury through the technical rule of *res adjudicata*, the affirmance should be without prejudice to the right of the several companies to contest their liability to pay any part of the tax, in respect of income not derived from business. This will not necessarily lead to any great amount of litigation, for in most cases the Government undoubtedly will allow the necessary deductions without litigation.

Washington, March 18, 1910.

WILLIAM D. GUTHRIE,

VICTOR MORAWETZ,

*Of counsel for Appellees in No. 752.*



CORPORATION TAX CASES.

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Supreme Court of the United States.

OCTOBER TERM, 1910. No. 410.

FRANCIS L. HINE, Appellant

*versus*

Office Supreme Court U. S.  
FILED  
JAN 16 1911  
JAMES H. MCKENNEY,  
Clerk.

HOME LIFE INSURANCE COMPANY, THOMAS H. MESSENGER, J. WARREN GREENE, H. E. PIERREPONT, THOMAS T. BARR, GEORGE E. IDE, WILLIAM A. NASH, JOHN F. PRAEGER, ELLIS W. GLADWIN, JOHN E. BORNE, WILLIAM M. ST. JOHN, JOHN S. FROTHINGHAM, MARTIN JOOST, E. LE GRANDE BEERS, COURTLAND P. DIXON, ANTON A. RAVEN, ROBERT B. WOODWARD, WILLIAM A. MARSHALL and WILLIAM G. LOW, JR., Directors of said Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REHEARING.

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BRIEF ON BEHALF OF APPELLEES.

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WASHINGTON, D. C., JANUARY, 1911.

WILLIAM D. GUTHRIE,

VICTOR MORAWETZ,

HOWARD VAN SINDEREN,

*Of counsel for Appellees.*

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CORPORATION TAX CASES.

**Supreme Court of the United States.**

OCTOBER TERM, 1910. No. 410.

FRANCIS L. HINE, Appellant,

*versus*

HOME LIFE INSURANCE COMPANY, THOMAS H. MESSENGER, J. WARREN GREENE, H. E. PIERREPONT, THOMAS T. BARR, GEORGE E. IDE, WILLIAM A. NASH, JOHN F. PRAEGER, ELLIS W. GLADWIN, JOHN E. BORNE, WILLIAM M. ST. JOHN, JOHN S. FROTHINGHAM, MARTIN JOOST, E. LE GRANDE BEERS, COURTLAND P. DIXON, ANTON A. RAVEN, ROBERT B. WOODWARD, WILLIAM A. MARSHALL and WILLIAM G. LOW, JR., Directors of said Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
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REHEARING.

BRIEF ON BEHALF OF APPELLEES.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York, sustaining a demurrer interposed on behalf of the defendant Home Life Insurance Company and its directors and dismissing the bill. The controversy arises under section 38 of the act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, c. 6, 39 Stat. 112. The text of section 38 is printed in full in the appendix to this brief and also the text of sections 27 to 37, inclusive, of the act of Congress of August 27, 1894 (28 Stat. 509, c. 349). The suit was brought by the complainant, Francis L. Hine, as a stockholder and policy-holder, to enjoin the defendant

company and its directors from complying with the law on the ground that the tax was unconstitutional and that its payment would be an *ultra vires* act and a waste of the funds of the defendant company, etc. The facts are not in dispute, and are correctly stated in the bill of complaint and in appellant's brief at pages 5-9. The defendant and its directors were advised that the act of Congress, if construed as being limited to a tax upon income derived directly from the carrying on of business, was a valid excise within the taxing power vested in Congress by the Constitution of the United States.

The Home Life Insurance Company is a life insurance company incorporated under the laws of the State of New York, and has a capital stock of \$125,000, and assets of approximately \$2,000,000 (fol. 2). The company owns real estate of the value of \$1,643,609; United States Government bonds to the amounts of \$11-193; bonds of the State of New York to the amount of \$109,500; municipal corporate stock of the City of New York to the amount of \$102,160; bonds of other municipal corporations within the United States to the amount of \$53,800; bonds and stocks of solvent corporations incorporated under the laws of the United States or of one or more states, to the amount of upwards of \$10,000,000; and real estate bonds and mortgages to the amount of \$6,105,030 (fol. 3). The net income of the company for the year ending December 31, 1909, amounted to about \$450,000, and a large part of this income was derived from the securities hereinbefore mentioned (fol. 4).

Since the original argument at the last term, the appellee Home Life Insurance Company has paid the

tax for the year 1909 under due protest. This tax was levied not only on income derived from the business of life insurance, but on income derived directly from real and personal property and United States and municipal bonds. The payment under protest has not terminated the controversy or adversary litigation between the parties. The tax is a permanent one, accruing from year to year, and the right of the complainant to enjoin its continued voluntary payment as an *ultra vires* act is still a matter in controversy and is exactly the same to-day as it was when the bill was filed and the prior hearing was had. Any decision rendered would be controlling as to future years so long as the act of August 5, 1909, remained in force. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 395, 398, 401.

There are three contentions before the court, viz. :

1. On behalf of the appellant, it is contended that the act of August 5, 1909, is wholly unconstitutional in so far as it imposes a tax upon the income of corporations.
2. On behalf of the United States, it is contended that the act imposes a valid tax not only on income derived from business sources, but on income derived directly from real and personal property and from United States and municipal bonds.
3. On behalf of the appellees, however, it is contended that the act properly construed imposes an excise tax only on income derived from the carrying on or doing business, and does not impose a tax on income derived directly from real and personal property and from United States and municipal bonds.

The argument in support of the contention of the appellees may be divided as follows for convenience of discussion:

I. A tax upon income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution.

II. Congress cannot constitutionally impose an excise tax measured by non-taxable income.

III. The act of August 5, 1909, should be construed as imposing an excise tax only upon income derived from the carrying on or doing business.

IV. Is the act of August 5, 1909, severable?

## I.

A TAX UPON INCOME DERIVED FROM THE CARRYING ON OR DOING BUSINESS IS AN EXCISE AND NOT A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION.

The act of Congress of August 5, 1909, c. 6, 39 Stat. 112, which imposes the tax in question, reads as follows:

“Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or in-

insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however*, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

The Constitution of the United States provides in Article I as follows:

Section 2, par. 3. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

Section 8, par. 1. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all

duties, imposts and excises shall be uniform throughout the United States."

Section 9, par. 4. "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It is no longer open to question that a tax upon the carrying on or doing business or upon the net income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution. *Pacific Insurance Company v. Soule*, 7 Wall. 493, 443; *Railroad Co. v. Collector*, 100 U. S. 595, 598; *Springer v. United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 411; *South Carolina v. United States*, 199 U. S. 437, 454. It is likewise no longer open to question that the constitutional provision that excises shall be uniform throughout the United States merely requires geographical uniformity. *Knowlton v. Moore*, 178 U. S. 41.

The bill of complaint in the case at bar shows that a part of the income of the Home Life Insurance Company is derived from sources which are not taxable by Congress except under the rule of apportionment. Thus, it derives income from investments in real and personal property as well as from investments in bonds of the State of New York, corporate stock of the City of New York and bonds of other municipal corporations within the United States (fols. 3-4). A tax upon income derived directly from any of these sources is clearly unconstitutional unless apportioned, as was held in the *Income Tax Cases* of 1895, *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 583; rehearing 158 U. S. 601, 628.

In *Knowlton v. Moore*, 178 U. S. 41, 81, the court was



called upon to analyze and declare the exact question decided in the *Pollock* case. In so doing, the following language was used (p. 82):

“ Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned.”

Of course, the fact that the court thus spoke of taxes on “ persons ” does not warrant the suggestion that similar taxes on corporations would be of a distinctly different nature, or that what would be a direct tax if imposed on persons would become an indirect tax or excise if imposed on corporations. The *Pollock* and *Hyde* cases before the court in 1895 involved only the property and income of corporations, and not that of persons, and, hence, the case at bar cannot be distinguished from them upon this point.

Mr. Chief Justice Fuller in speaking of municipal bonds further said in the *Pollock* case (158 U. S. at p. 630):

“ We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution.”

See also *Ambrosini v. United States*, 187 U. S. 1, 7.

It should be equally clear that Congress may not tax United States bonds and particularly those issued under the acts of July 14, 1870, 16 Stat. 272, and January 14, 1875, 18 Stat. 296, which bonds declare on their face that "the principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority." Although it is true that the Constitution does not expressly prohibit the United States from impairing the obligation of contracts, there ought to be no longer any doubt that the provision of the Fifth Amendment, that no person shall be deprived of property without due process of law, is sufficient to prevent any such impairment or destruction of contract rights. *Sinking-Fund Cases*, 99 U. S. 700, 718; *United States v. Union Pacific Railway*, 160 U. S. 1, 33.

Within the ruling in the *Pollock* case, there can be no doubt that if the act of Congress now before the court had in so many words laid a tax on income derived from real and personal property and from municipal bonds, it would have been clearly unconstitutional, because not apportioned. The question now presented, therefore, is whether or not such income can nevertheless be indirectly taxed by means of a so-called special excise tax upon the carrying on or doing business by corporations, in other words, by merely changing the name of the tax. To repeat, both of the Income Tax Cases of 1895, that is, *Pollock v. Farmers' Loan and Trust Company* and *Hyde v. Continental Trust Company*, 157 U. S. 429 and 654, were cases which involved only the income of corporations, and it was such corporation income derived

directly from real and personal property which was then held to be non-taxable by Congress except by a direct and apportioned tax. The nature and essential characteristic of such a tax cannot be changed by merely calling it by another name. As Mr. Chief Justice Fuller said in the *Pollock* case (157 U. S. at pp.581, 583):

“ If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: ‘ It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.’ . . .

“ But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.”

Nor can the nature of the tax imposed by the act of

August 5, 1909, be changed by the mere fact that it is imposed only upon corporations, joint stock companies and associations organized for profit, with a capital stock represented by shares, and upon insurance companies. If a tax imposed upon individuals would be a direct tax within the meaning of the Constitution, a similar tax imposed upon corporations, joint stock associations, or insurance companies of any class, must be equally a direct tax; and so, also, if a tax imposed upon individuals would be an excise within the meaning of the Constitution, a similar tax imposed upon corporations and other joint stock companies organized for profit, or upon insurance companies, must be equally an excise.

The constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Indeed, corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is co-extensive with the power to tax individuals and flows from exactly the same constitutional provisions as apply to individuals. Therefore, Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that it cannot impose upon individuals, and it cannot impose upon individuals an excise tax that it cannot impose upon corporations and other companies or associations. This ought to be a self-evident proposition. If not, where is the power to tax corporations?

It is contended by the appellant that the act of August 5, 1909, in so far as it taxes corporations, necessarily imposes a franchise tax, and that Congress cannot impose a franchise tax upon state corporations. The theory seems

to be that as the right or franchise to carry on business in corporate form is conferred by the state, every state corporation is to be deemed an instrumentality of the state governments, and that, therefore, a tax upon them would interfere with the sovereignty of the states. In the final analysis, does not this argument mean that Congress cannot tax state corporations at all even if federal corporations and individuals are similarly taxed? And is this argument to be carried to its logical conclusion, namely, that every business and occupation in the United States can be taxed by Congress by means of an excise, except businesses or occupations carried on by state corporations? Of course, no such extreme position is taken by our learned adversaries. The point really is, not that Congress cannot tax state corporations at all, but that the selection and classification of state corporations for taxation when individuals or copartnerships are not similarly taxed, is arbitrary and as such is beyond the power of Congress, or in conflict with the Fifth Amendment.

The mere franchise or license to be a corporation or to carry on business in corporate form certainly does not of itself make a corporation a governmental instrumentality or agency. The great majority of corporations, like ordinary partnerships, are formed under general laws for purely private purposes. At the present day, the laws of the several states authorize the formation of corporations for any lawful business purpose as freely as they authorize or permit the formation of partnerships, by simply executing and filing a certificate or articles of incorporation. If a state were to enact a law permitting partnerships to be formed only in a prescribed man-

ner and upon payment of a license fee, no one would urge that this right constituted a special franchise or privilege which would exempt partnerships from federal taxation. The proposition that a state, by authorizing individuals or partnerships to form themselves into a corporation and carry on business in corporate form, can thereby exempt them from the power of Congress to impose an excise tax upon their business ought only to be plainly stated in order to refute itself. And probably no one would seriously so contend.

There are, of course, special franchises which may be conferred by a state upon corporations or individuals to enable them to perform certain governmental functions which would otherwise be performed by the state itself, as, for example, the franchise to use the public streets and highways or to condemn private lands for the construction, maintenance and operation of railroads, gas works, water works, etc. Those who exercise these special franchises may, perhaps, be deemed governmental instrumentalities of the state, and it may well be that they could not be singled out and directly taxed by Congress as a separate and distinct class; and, undoubtedly, public utilities, when owned by the state itself and not conducted by it as a private business for profit, ought not to be taxable by Congress. But, it is well established that such public utilities, when owned and operated by private corporations or by individuals for purposes of profit, are proper subjects of taxation, *Railroad Company v. Peniston*, 18 Wall. 5, 31, and that, if owned and operated by the state as a business for profit, they become

subject to taxation by Congress within the principle of the *South Carolina* case, *supra*, 199 U. S. 437.

In the case of the Coney Island and Brooklyn Railroad Company, No. 409, submitted with the case at bar, the defendant railroad company operates a railroad under a special franchise from the State of New York, but it is well settled in that state that such a special franchise is entirely distinct from the so-called franchise to be a corporation. *City of New York v. Bryan*, 196 N. Y. 158, 163; *People v. O'Brien, et al.* 111 N. Y. 1, 47. A federal tax on the franchise to condemn property and to operate the railroad in the State of New York might come within the ruling of the court in the case of *California v. Pacific Railroad Co.*, 127 U. S. 1, but that ruling certainly would not apply to a tax upon the business of the railroad corporation. This case did not overrule or qualify *Railroad Company v. Peniston*, 18 Wall. 5. A tax upon the mere carrying on of business, levied impartially and uniformly upon all corporations, is essentially different from a tax on so-called special franchises and from a tax on the franchise to be a corporation or to carry on business in corporate form.

The fact that the tax in question applies to all unincorporated joint stock companies and associations organized for profit, and having a capital stock represented by shares, indicates that Congress did not regard the tax as a corporate franchise tax. As is well known, there are many large joint stock associations in the United States that are not incorporated and that do not pay corporate franchise taxes. Thus, several of the large express companies are organized under the laws of a state, *e. g.*,

New York, just as partnerships are organized under the laws of a state; but they are not incorporated. Although such organizations possess some of the attributes of corporations and hence may be properly and fairly classified with them for purposes of taxation, as shown in *People ex rel. Platt v. Wemple*, 117 N. Y. 136, they are nevertheless not vested with corporate franchises and are not corporations.

Upon the prior hearing, it was suggested that an excise tax imposed by Congress generally upon *all* businesses and occupations would be unconstitutional, but that a tax upon selected or enumerated businesses or occupations would not be unconstitutional. Stated in other language, the contention seemed to be that Congress may constitutionally lay an excise tax upon any number, however large, of different businesses and occupations, provided that the several businesses or occupations are separately described, but that it cannot impose a tax in general terms upon all businesses and occupations, because such a tax would be a direct tax. The isolated expressions selected from decisions of this court do not support this proposition. There are numerous instances in which Congress has imposed excise taxes upon all businesses, trades and professions without enumerating them separately. Thus, in the act of August 6, 1861, c. 45, sec. 49, 12 Stat. 309, the tax was levied upon income derived "from any profession, trade, employment, or vocation, carried on in the United States or elsewhere"; and the same language was used in the act of June 30, 1864, c. 173, sec. 116, 13 Stat. 281; in the act of March 3, 1865, c. 78, sec. 1, 13 Stat. 479, and in the act of March 2, 1867, c. 169, sec. 13, 14



Stat. 478. In the act of July 14, 1870, c. 225, sec. 6, 16 Stat. 257, the language was "income derived from any business, trade, or profession carried on in the United States"; whilst in the act of August 27, 1894, c. 349, sec. 27, 28 Stat. 553, Congress reverted to the prior words, "any profession, trade, employment, or vocation." There is, of course, no ambiguity or uncertainty in the word "business," and the phrase "carrying on or doing business," and they are common forms of expression in tax laws.

There is, however, a serious question as to whether Congress may select state corporations as a separate class and impose upon them an excise tax "with respect to the carrying on or doing business by such corporation," while exempting or not similarly taxing individuals and co-partnerships engaged in carrying on or doing identically the same business under substantially like conditions. The recent decision of this court, reported since the hearing at the last term, in *Southern Railway Co. v. Greene* 216 U. S. 400, would seem to indicate that no such classification would be reasonable or constitutional. Congress has no relation to or power over state corporations other than the relation it bears to or the power it may exercise over individuals or partnerships. If a state, aside from its power to create, regulate or exclude corporations, could not discriminate against corporations and in favor of individuals or partnerships without violating the Fourteenth Amendment, then any attempt by Congress so to discriminate may likewise be unconstitutional under the Fifth Amendment. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 410.

At any rate, this court has never held that corporations may be thus discriminated against as to the carrying on of business, and Congress has never before attempted to do so. As Mr. Justice Bradley said in the leading case of *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 237: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." The classification of corporations as a separate class by the states has been sustained on grounds which are, at least partly, unavailable in support of an act of Congress. *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap R'd Co. v. Pennsylvania* 134 U. S. 232, 237; *Home Ins. Company v. New York*, 134 U. S. 594, 606; *New York State v. Roberts*, 171 U. S. 658, 665; *Florida Central &c. R'd Co. v. Reynolds*, 183 U. S. 471, 477; *Berea College v. Kentucky*, 211 U. S. 45, 54.

## II.

CONGRESS CANNOT CONSTITUTIONALLY IMPOSE AN EXCISE TAX MEASURED BY NON-TAXABLE INCOME.

It is in substance and effect argued on behalf of the Government that if Congress has constitutional power to impose upon every corporation an occupation tax or "a special excise tax with respect to the carrying on or doing business," it may measure that tax by the entire net income of the corporation, including not only income derived from business, but also income derived directly from investments in property, such as interest on United States, state, and municipal

bonds, rents of real estate, and interest, dividends, etc., from personalty. This contention is based principally upon the argument that corporations and joint-stock corporations organized for profit are necessarily organized for business purposes, and, therefore, that all their property, of whatever kind or nature and however held or employed, must be deemed to be held for business purposes and used in carrying on or doing business. From these premises the conclusion is drawn that any tax upon the income of a corporation or joint-stock association is in its nature essentially and always an excise on business and an occupation tax.

To this argument it should be a sufficient answer to say that the premises upon which it is based are not true in fact or in law. Corporations and joint-stock companies and associations, though organized for profit and having a capital stock, may lawfully hold and in fact often do hold property not employed in their business, just as individuals do. The same is particularly true of insurance companies. It often happens that business corporations and associations set apart and invest certain assets which are not in any sense used in the business. Such a course certainly is not prohibited by law. Income from these investments is not in fact income derived from carrying on or doing business. Again, business corporations may acquire property in the expectation of using it in their business at some future time, or by gift or donation or subsidy, and the income received from the property so held before it is actually used for business purposes is income derived directly from the property, and not income from the carry-

ing on or doing business. Similarly, it is well settled that business corporations may acquire property not for use in their business, but for the purpose of obtaining upon economical terms the use of other property required for business purposes. For example, corporations like banks or insurance companies requiring permanent offices often purchase or erect office buildings, and rent to tenants so much of the building as is not used by the corporation in carrying on its own business. The greater part of such a building is frequently thus rented. The rents so received are not income derived from carrying on or doing the banking or insurance business.

An examination of the exact issues presented for decision in the Income Tax Cases of 1895 will show that those cases involved an income tax imposed on two trust companies, New York corporations, under section 32 of the act of August 27, 1894 (c. 349, 28 Stat. 509), which read as follows :

“Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships.”

It was this tax, as laid upon these two corporations, that was held to be partially a direct tax and, therefore, in violation of the Constitution because not apportioned. No individual was before the court. Of course, the conclusion followed, *a fortiori*, that the similar tax imposed by section 27 of the same act as part of one general scheme of taxation upon all citizens of the United States and upon all persons residing in the United States was likewise unconstitutional and void in so far as it included a tax on income derived from the rents of real estate and from personal property or municipal bonds. But it was not held or intimated that the act of 1894 was unconstitutional in so far as it applied to income derived from carrying on business. On the contrary, it was conceded by counsel and recognized by the court that a tax on income derived from business or occupation would not be a direct tax but would be an excise. As Mr. Chief Justice Fuller said, in delivering the opinion of the court on the rehearing in the *Pollock* case, 158 U. S. at p. 635:

“We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.”

It should be noted that section 27 of the act of 1894 (printed in the appendix) specifically included not only a direct tax on income “derived from any kind of property, rents, interest, dividends, or salaries,” but also an excise tax “on gains, profits and income . . . derived . . .

from any profession, trade, employment, or vocation carried on in the United States or elsewhere." There can be no doubt that if the act of 1894 had merely imposed a tax on gains, profits and income derived by individuals from any profession, trade, employment, or vocation, and on net income derived by corporations from "the carrying on or doing business," the act would have been unanimously upheld as a valid excise tax within the ruling of the prior decisions of the court.

Nor can there be any doubt that the court then distinctly held that a tax on income derived by the *corporations* before the court—namely, The Farmers' Loan and Trust Company and The Continental Trust Company—from property, real or personal, and from municipal bonds was a direct tax. If, as now argued on behalf of the Government, a tax on the net income of corporations, etc., is essentially and invariably an excise, even though the income be derived partly or wholly from non-taxable securities, or property taxable only by the rule of apportionment, then the decisions of 1895 were erroneous, and everybody at that time wholly overlooked the real point involved; for according to this argument the entire income of every business corporation must in every case be deemed income derived from carrying on business and the tax imposed by the act of 1894, therefore, was wholly an excise tax as to the corporations then before the court, and not, as held by the court, partly a direct tax and partly an excise. In other words, if the argument now advanced by counsel for the Government be sound, the court and all the counsel in the Income Tax Cases failed to perceive that the true rule was that any tax upon the

income of a business corporation, joint-stock association, unincorporated company, or, indeed, every partnership formed to carry on business, is in its essence an excise tax on business, whether or not the income be derived directly from non-taxable securities or other property not actually used in business.

We may test the proposition by applying the rule now urged by the Government to individuals, for the power of Congress to tax corporations is exactly the same as the power to tax individuals. Probably more than ninety-nine per cent. of the adult male residents of the United States are engaged in some taxable business, trade, profession, employment, or vocation. According to the argument of the Government, Congress in every case could impose an excise occupation tax measured by the wealth of the individual, including real estate and non-taxable bonds, or by the income derived therefrom. Thus, by the simple device of imposing a special excise tax "equal to" or "measured by" the property or income of the individual to be taxed, Congress could nullify the constitutional prohibition against direct taxes without apportionment and could impose taxes upon state, county and municipal bonds, and upon tax-exempt United States bonds held by any individual engaged in any taxable business, trade, profession, employment, or vocation!

It should be observed also that if the argument now advanced on behalf of the United States be sound, many of the decisions of the court sustaining excise taxes on corporations have proceeded on entirely erroneous reasoning. The recent case of the *Spreckels Sugar Refining Company* may be cited as an example (192 U. S. 397,

410, 417). In that case, the company was organized for the purpose of carrying on or doing "the business of manufacturing sugar," and had no other business. According to the present view of the Government, the company could not legally have owned property unconnected with its business, and all income must necessarily have been income from carrying on or doing business. Yet, the court held that income derived from property "wholly distinct from the business of refining sugar" was not taxed.

In *Galveston, Harrisburg &c. Ry. Co. v. State of Texas*, 210 U. S. 217, the court considered the constitutionality of a Texas statute imposing upon each railroad company within the State of Texas an annual tax "*equal to one per cent. of its gross receipts.*" It was argued on behalf of the State of Texas that this tax was not a tax upon property or upon gross receipts but was an occupation tax upon a Texas railway company "*equal to a given percentage calculated on the gross receipts,*" that is, of course, measured by such gross receipts. The railway company, however, contended that in so far as the tax was based on, or was measured by, receipts derived from interstate transportation, the tax was a burden on interstate commerce and therefore wholly invalid. In deciding that the tax was invalid, the court used the following language (at pp. 227 and 228):

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a



regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37; *Asbell v. Kansas*, 209, U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the State court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

In *Western Union Tel. Company v. Kansas*, 216 U. S. 1, the State of Kansas had passed a statute providing, among other things, that before any foreign corporation should have authority to do local business in Kansas it should pay to the State Treasurer a charter fee of one-tenth of one per cent. of its authorized capital stock. The Western Union Telegraph Company, a New York corporation engaged in interstate commerce and seeking to do local business in Kansas, refused to pay the required fee, claiming that the law was unconstitutional on the ground that the State of Kansas could not require a foreign corporation, as a condition of doing a local business in Kansas, to pay a tax based upon or measured by the total capital stock of the corporation representing all its business and property wheresoever

situated, because business transacted and property located beyond the state was not taxable. It was claimed on behalf of the state that, as the state could prevent foreign corporations from doing local business in Kansas on any terms, it could grant the privilege of doing local business upon such terms as the state might see fit to impose. The court, however, held that the act was unconstitutional. Mr. Justice Harlan, delivering the opinion of the court, used the following language:

"The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the State statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with the lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere." (pp. 30-31.)

"The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the State as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported, *Brown v. Maryland*, 12 Wheat. 419, 444; or that a tax on the stock

of the United States is a tax on the contract under which it was issued, and a tax on the power to borrow money on the credit of the United States, *Weston v. Charleston*, 2 Pet. 449, 467, 468; or that a tax on the salary of an officer of the United States would be a tax on the means employed by the government of the Union to execute its constitutional powers, *Dobbins v. Erie County*, 16 Pet. 435, 449; or that a tax on an ordinary bill of lading for property taken out of a State would be a tax on the property covered by that instrument, *Almy v. California*, 24 How. 169; or that a tax on the amount of sales made by an auctioneer would be a tax on the goods sold, *Cook v. Pennsylvania*, 97 U. S. 566, 573. But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent of the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out of the State." (pp. 32-33.)

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance" (p. 37).

See also *Southern Railway Co. v. Greene*, 216 U. S. 400, 416; *Home Savings Bank v. Des Moines*, 205 U. S. 503, 519; *Louisville, &c. Ferry Co. v. Kentucky*, 188

U. S. 385, 396, 398; *State Tonnage Tax Cases*, 12 Wall. 204, 217.

It is submitted that the underlying principle of these decisions is that a license or occupation tax cannot be imposed by a state upon foreign corporations, measured by the amount of non-taxable property or the amount of non-taxable interstate business of the corporation, and that any such attempt would establish an unconstitutional basis of classification for purposes of taxation; in other words, that a tax cannot be measured by non-taxable property or income. If we apply the same principle to the case at bar, it must follow that Congress cannot directly or indirectly measure an excise tax on corporations or individuals by property or income which is not taxable at all or only taxable by a direct and apportioned tax.

### III.

THE ACT OF AUGUST 5, 1909, SHOULD BE CONSTRUED AS IMPOSING AN EXCISE TAX ONLY UPON INCOME DERIVED FROM THE CARRYING ON OR DOING BUSINESS.

As this court has repeatedly pointed out, and notably in the recent decision in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, if an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. The opinion of the court in that series of important appeals laid down the controlling rule as follows:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably sus-

ceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Comm.*, 211 U. S. 407."

Section 38 of the act of August 5, 1909, is susceptible of a construction which may render the act constitutional and avoid the grave and doubtful constitutional questions involved in the contention of the Government or suggested in the numerous briefs filed on behalf of the various appellants. According to this construction, as the act purports to impose "a special excise with respect to the carrying on or doing business," the tax is to be assessed upon net income received "from all sources" in carrying on or doing business, but is not to be assessed upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act imposes an excise tax upon business or occupation and not in any respect a direct tax on property or on non-taxable securities, and thereby any conflict with express or implied constitutional limitations is avoided.

Congress has acted upon the decisions of this court in

the Income Tax Cases, and has proposed for adoption by the several states a Sixteenth Article of Amendment to the Constitution, to read as follows:

“Article 16. The Congress shall have power to lay  
 “and collect taxes on incomes, from whatever source  
 “derived, without apportionment among the several  
 “States and without regard to any census or enumeration.”

There is, therefore, now pending before the people of the United States a proposal submitted by the same Congress that passed the act in question to amend the Constitution so as to permit Congress to tax without apportionment incomes derived from real and personal property. Congress has practically accepted the construction of this court that certain income taxes, *i. e.*, taxes on income derived directly from real or personal property, were direct taxes, and it has proposed that the Constitution be amended by providing that direct taxes on income need not be apportioned as all other direct taxes must be. The purpose of the amendment plainly and avowedly was to meet the decision of the court in the *Pollock* case. There was no need of an amendment to enable Congress to impose excise taxes on incomes derived from the carrying on of business by individuals, partnerships, or corporations, and no one seems to have disputed or to be now disputing the power to do so. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, and cases cited. The act of August 5, 1909, was passed within two weeks of the submission by Congress of this proposed amendment, and the action in both instances was *in pari materia*. Under these circumstances, it does not seem reasonable to assume that Congress intended by this act now before the court never-

theless to impose an income tax on the income of corporations which would be partly a direct tax within the decision in the Income Tax Cases, and thereby call upon the court to reconsider and overrule those cases.

If the phrase "from all sources" found in the act of 1909 be construed to relate to the preceding words evidencing the intention of Congress to impose "a special excise tax with respect to the carrying on or doing business," we shall then impute to Congress the *intention* not to violate any of the provisions of the Constitution as authoritatively interpreted by this court. Otherwise, it must be held that Congress intended, in defiance of the decision of this court in the Income Tax Cases, to impose a tax upon income derived from non-taxable securities and from real and personal property, and it must be held also that the action of Congress in proposing a Sixteenth Amendment to the Constitution was meaningless and unnecessary so far as corporations were concerned, or indeed so far as any persons or partnerships engaged in business were concerned.

To construe the present act of Congress as not applicable to income derived from rents or directly from real and personal property and municipal bonds would be in accordance with the well settled rule of statutory construction that a general provision must be deemed limited by special statutory or constitutional provisions or exemptions. Thus, the act of 1909 should be deemed limited by the constitutional requirement that a tax upon income derived directly from real or personal property must be apportioned among the states. Again, the act of 1909 should be construed as

subject to the implied constitutional limitation that bonds issued by the state governments are not taxable directly or indirectly by Congress. For the same reason, the act of 1909 should be construed as subject to the exception of the special statute providing that United States bonds shall not be taxed by Congress. This familiar rule of construction is illustrated by such cases as *Kepner v. United States*, 195 U. S. 100, 125, and *United States v. Nix*, 189 U. S. 199, 205.

The test in each case should be whether the income had been received as direct income from property or as income from carrying on business. Rents of real estate collected from others would not be taxed because this would be a direct tax, but income derived from the use of real property in carrying on a business would be taxable. Thus, a corporation owning real estate used in conducting its business, such as the plant of a manufacturing company, the hotel of a hotel company, the mines of a mining company, the right of way, terminals and yards of a railroad, the docks, quays and wharves of a wharf company, or any other real estate employed in business and not leased to others, would be taxable thereon or on income derived therefrom by an excise tax; but rents collected upon real property leased to others would not be taxable except by a direct tax. Similarly, an excise tax could be imposed upon the income derived by a corporation from profits in its business of buying and selling real property, but not upon rents collected upon real property owned by the corporation as an investment and not used in its business, but leased to others. A tax upon income received by a corporation as interest on bonds



owned by it or upon loans of moneys to others would be a direct tax, but a tax upon profits derived from carrying on the business of dealing in securities or loaning money on commission would be an excise tax.

The decision of the court in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 417, would seem to be conclusive upon this point. Mr. Justice Harlan there said :

“ But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration or the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged.”

If, as seems to be urged by the Government, Congress clearly intended in and by the act of 1909 to impose a tax on all the net income of corporations, not only that derived from the subject matter of the tax, *i. e.*, the car-

*rying on or doing business*, but also that derived from real and personal property and municipal bonds, in the very teeth of the decision in the Income Tax Cases, which distinctly held that a tax on income derived by corporations from real and personal property and municipal bonds was a direct tax, surely such an extraordinary intention would have been declared in unmistakable terms. Congress would have said "income derived from business transacted and capital or surplus invested", and thus have plainly covered, if it had so intended, what was involved and decided in prior cases. The argument in support of the broad construction urged by the Government must necessarily be that the words "from all sources" do not relate to the antecedent subject matter of the tax, namely, "the carrying on or doing business," but mean something much broader, or, in other words, are equivalent to the words "from business transacted and capital and surplus invested."

It is the well-known story of the time, of which the court will undoubtedly take judicial notice, that the Sixteenth Amendment was proposed in connection with the passage of the Tariff Law of 1909. A number of senators and representatives were insisting upon inserting in that Tariff Law an income tax similar to the tax contained in the act of 1894, so as thereby to force a reconsideration of the ruling in the prior cases. It was in order to prevent any general income tax provision in the act of 1909 similar to the provision contained in the act of 1894, and in order to avoid the unseemly position of the Congress declining to accept the authoritative decision of this court, that a compromise was entered into under

which it was agreed to pass a joint resolution to amend the Constitution of the United States as suggested by this court in the opinion in the *Pollock* case (158 U. S. 635), so as to vest in Congress power to lay direct income taxes without apportionment. It would be strange, indeed, if in view of this indisputable history, it should now be held that after all it was the deliberate intention of Congress, in and by section 38 of the act of 1909, to enact a provision which, as to corporations, joint stock associations and insurance companies, should be identical in substance and effect with the income tax provision contained in the act of August 15, 1894, and thus plainly in conflict with the ruling in the *Income Tax Cases* of 1895.

It will be observed that the language used in the act of 1909 with respect to foreign corporations is significantly and distinctly different from the language used with respect to domestic corporations. Instead of measuring the tax by entire net income received from all sources, as in the case of domestic corporations, Congress provided that in the case of foreign corporations the tax should be upon the amount of net income received from "business transacted *and* capital invested within the United States and its Territories, Alaska and the District of Columbia." According to the contention of the Government, as all income of a corporation is derived from business, the words "and capital invested" were unnecessary and are meaningless. But if they were not unnecessary and meaningless, then surely it was because Congress recognized the difference between transacting business (that is,

the carrying on or doing business) on the one hand and the investment of capital on the other.

The separate provision taxing the income of foreign corporations derived from "capital invested within the United States" is clearly unconstitutional within the ruling in the *Pollock* case. On such capital invested in real or personal property, the tax is direct and not an excise. But, so far as we have been informed, no foreign corporation is now before the court challenging the constitutionality of the act because, as to it, the tax is partly an excise tax on business transacted and partly a direct tax on capital invested.

So also as to the taxation of corporations engaged in the export business or engaged in transacting business in foreign countries. Assuming that income derived from exporting or income derived from carrying on or doing business in foreign countries is not within the taxing power of Congress under the rules declared in such cases as *Railroad Co. v. Jackson*, 7 Wall. 262; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 181; *Louisville, &c. Ferry Co. v. Kentucky*, 188 U. S. 385; *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299; *Delaware, L. &c. R.R. Co. v. Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky* 199 U. S. 294; *Selliger v. Kentucky*, 213 U. S. 200; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; it may be ruled that it does not lie with those not so engaged to challenge the constitutionality of the act of Congress in so far as it affects other corporations not before the court.

The provision in the act of 1909 excluding income re-

ceived as dividends upon stock of other corporations, etc., does not imply that no other deductions were intended by Congress. The exclusion of income received as dividends on stock of other corporations was inserted in the act for the purpose of avoiding double taxation, in the case of holding companies whose whole *business* frequently is to acquire and hold stocks. Congress presumably deemed it unjust to compel a holding company to pay a tax upon income derived from dividends of other companies which had already paid the tax, although if a corporation has been organized for the purpose of carrying on the business of holding securities, there is, perhaps, no reason why it can not be subjected to taxation upon net income or profits derived from that occupation or business. *People ex rel. Vandervoort R. Co. v. Glynn*, 194 N. Y. 387, 389.

Under the laws of many of the states, which authorize the formation of corporations for any lawful business purpose, corporations may be organized for the purpose of holding or dealing in the bonds and stocks of other corporations and for the purpose of holding and dealing in real estate. Innumerable corporations have been organized for these purposes, as must be shown by the reports on file under the act of August 5, 1909. In New York, for example, such corporations may be organized under the Business Corporation Law, ch. 12, laws 1909, entitled "An act relating to Business Corporations, constituting Chapter Four of the Consolidated Laws." This statute authorizes the creation of "a stock corporation for any lawful business purpose or purposes," and under this provision many companies have been organized either to

hold stocks or to hold real estate. So, in New Jersey, the statute authorizes the formation of corporations for any lawful purpose, and, as is well known, it was under this New Jersey statute that the Northern Securities Company was organized in November, 1901, for the purpose of holding the securities of other corporations. *Northern Securities Company v. United States*, 193 U. S. 197.

Moreover, under recognized rules of construction, the exception or exclusion of dividends from stocks of other corporations does not signify that the general clause "from all sources" must be given any broader interpretation than if no such exception had been made. In *Baggaley v. Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 636, 628, Mr. Justice Lurton, speaking for the Circuit Court of Appeals, Sixth Circuit, among other things, said:

"We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. *Tinkham v. Tapscott*, 17 N. Y. 141."

See also *Mullins v. The Treasurer of the County of Surrey*, 5 Q. B. D. 170, 173, 174, and *The West Derby Union v. The Metropolitan L. Assurance Society*, [1897]

A. C. 647, 652, 655. The rule as to exceptions is analogous to the rule which obtains in the case of provisos. They are often interpreted so as not in any way to limit or extend the principal clause. *Georgia Banking Co. v. Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 36, 37; *American Express Co. v. United States*, 212 U. S. 522, 534.

If the act of 1909 should be construed as applying only to income derived from the carrying on or doing business and as not applicable to income derived from non-taxable sources, the Treasury Department will find no difficulty in enforcing the provisions of section 38.

Under state laws imposing taxes upon the capital of corporations employed in business, or receipts derived from business, it is quite often necessary to make similar inquiry into the character and use of their property and the conduct of their businesses. *People ex rel. Singer Mfg. Co. v. Wemple*, 150 N. Y. 43; *Peo. ex rel. Chicago Junc. etc. Co. v. Roberts*, 154 N. Y. 1; *People ex rel. Hydraulic Co. v. Roberts*, 30 A. D. (N. Y.) 180, aff'd. 157 N. Y. 676; *People ex rel. Ft. George Realty Co. v. Miller*, 179 N. Y. 49; *People ex rel. Interb. R. T. Co. v. Williams*, 200 N. Y. 93, 103; *Commonweath v. Standard Oil Co.*, 101 Pa. St. 119; *Coal & Mining Co. v. Ladd*, 160 Mo. 435; *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727; *In re Alabama & C. R. Co.*, 1 Fed. Cas. 271; *Gilchrist v. Helena, H. S. & S. R. Co.*, 47 Fed. Rep. 593; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. Rep. 239; *Construction Co. v. Winton*, 208 Pa. St. 467, 471, 472; approved in *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 311;

*General Conference of Free Baptists v. Berkey*, 105 Pac. 411 (Cal.).

The various cases now before the court serve to show how the act of 1909 would operate if construed so as to eliminate income from non-taxable securities and income derived directly from sources which can be taxed only by a direct tax apportioned among the states.

No. 411, the case of the Northern Trust Company of Illinois, presents somewhat the same situation as the cases of Pollock and Hyde against the New York trust companies in 1895 (157 U. S. 429). The net income of the Northern Trust Company amounts to more than \$205,000 per annum. Of this about \$9,000 represents income and rents derived from real estate and \$50,000 interest on municipal bonds (record in No. 753, fol. 3). Deducting these items, the net income subject to the tax is \$146,000.

In No. 415, the Park Realty Company owns real estate in the city of New York, and on this property a hotel, known as the Hotel Leonori, has been erected, which has been leased at a fixed annual rental of \$55,000 (record in No. 757, fol. 6). If the property were owned and leased by an individual or partnership a tax on these rents would be indisputably a direct tax. It is no less a direct tax because the property is owned by a corporation which leases the hotel to an individual, who carries on the business of keeping a hotel. If it had been leased to a corporation which carried on the hotel business, the corporation would have been liable to pay the present tax on the net income derived from that business.



In No. 431, the case of the Broadway Realty Company, a different situation is presented. It may be that that company is engaged in the business of managing an office building, and that its income is the product of that business, just as the income of a hotel-keeper from renting rooms would be the product of the business of keeping a hotel.

In No. 446, it does not appear for what purpose the Clark Iron Company was incorporated. The bill of complaint merely shows that it is a Minnesota corporation and entitled to own and hold real estate within that state (record in No. 800, fol. 3). However, it does appear that the company leases its ore lands to other parties, and that the lessees carry on the mining operations. The income of the company is derived from rents and royalties resulting from the mining operations or business conducted by its lessees. Probably, there is no difference between its ownership as lessor and the ownership of an individual or partnership, but the case may have to be decided on its particular facts, as the actual operations of the company may constitute the carrying on of a business, and thus be differentiated from the simple case presented in 415.

In No. 457, it appears that the Boston Wharf Company, a Massachusetts corporation, carries on the business of dockage and wharfage (record in 819, fol. 3), and presumably was organized for that purpose. It has real estate of the value of \$5,000,000, and so far as appears all of it is employed in its business. The net income derived from dockage and wharfage will, of course, be income derived from the carrying on or doing business, even though the

plant be wholly real estate, just as the net income of a hotel, a manufacturing company, or a railroad may be all derived from the use and employment of real estate in carrying on or doing business. The position of an owner who leases real property to another at a rental, as in No. 415, is entirely different from that of an owner who himself uses his real estate in the conduct of his business.

#### IV.

##### IS THE ACT OF AUGUST 5, 1909, SEVERABLE?

The question of severability is difficult of solution. If, as urged on behalf of the Government, it was clearly the intention of Congress to levy a tax measured not only by net income derived from the carrying on or doing business but also by net income derived from real and personal property and municipal bonds, then it must be evident that the act of 1909 is in substance and effect the same as the act of 1894, if not indeed even stronger in this respect. How can the courts divide one phrase and create a measure for the computation of the tax which the Government now insists would be different from the measure actually contemplated and prescribed by Congress? This difficulty shows how desirable it must be to accept as sound the view urged in this brief, namely, that Congress only intended to levy an excise tax on income derived from business sources and did not intend directly or indirectly to violate the rule declared in the *Pollock* case.

There can be no doubt that if it was the *intention* of Congress to impose a tax on corporations as broad and

comprehensive as the tax imposed in and by the act of 1894, then it must necessarily follow that the act of 1909 is not severable and cannot be enforced in so far as it imposes a legitimate excise tax on income derived from the carrying on or doing business. Such was the decision in the *Pollock* case in regard to the prior statute.

Since the *Pollock* case reviewing the authorities and holding that the act of 1894 was not severable (158 U. S. at p. 635), the following cases have also held statutes not to be severable: *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *United States v. Ju Toy*, 198 U. S. 253; *Illinois Central Railroad v. McKendree*, 203 U. S. 514; *Hatch v. Reardon*, 204 U. S. 152; *The Employers' Liability Cases*, 207 U. S. 463.

On the other hand, since the case last cited, the court has declared in the case of *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 96, that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." See also *New York Central R.R. v. United States*, 212 U. S. 481, 496; *Chicago, M. & St. P. Ry. Co. v. Westby*, 178 Fed. 619, 629.

#### CONCLUSION.

For the reasons discussed in the foregoing points, it is respectfully submitted that the true construction of section 38 of the act of Congress of August 5, 1909, is that it imposes an excise tax on income derived only from business sources and not on income derived from real or per-

sonal property or non-taxable securities. Such a construction would render the operation and effect of the act wholly constitutional in so far as it imposes an excise tax on the corporations organized in the United States, now before the court, unless, of course, it be held that Congress in imposing an occupation or business tax cannot discriminate against state corporations in favor of individuals or partnerships similarly engaged in business.

WASHINGTON, D. C., January, 1911.

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Of counsel for appellees in No. 410.

CORPORATION TAX CASES

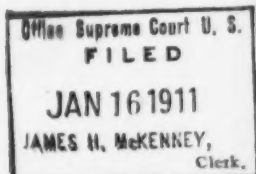
UNDER ACT OF CONGRESS OF AUGUST 5, 1909.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 410.



FRANCIS L. HINE, APPELLANT

*vs.*

HOME LIFE INSURANCE COMPANY ET AL.

REHEARING.

APPENDIX TO BRIEF OF APPELLEES CONTAINING

1. TEXT OF ACT OF AUGUST 5, 1909, p. 1.
  2. TEXT OF ACT OF AUGUST 15, 1894, p. 11.
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ACT OF AUGUST 5, 1909, SEC. 38, C. 6, 36 STAT. 112.

Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, however, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and pro-

viding for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

*Second.* Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United



States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and

any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

*Third.* There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance

company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total

amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Terri-

tories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

*Fourth.* Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the at-

tendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any Court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

*Fifth.* All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made

and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

*Sixth.* When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

*Seventh.* It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence

taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

*Eighth.* If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.



ACT OF AUGUST 15, 1894, SECS. 27 TO 37 INC.

C. 349, 28 STAT. 509.

\* By sections 27 to 37 inclusive of the act of Congress entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," received by the President August 15, 1894, and which, not having been returned by him to the House in which it originated within the time prescribed by the Constitution of the United States, became a law without approval (28 Stat. 509, c. 349), it was provided that from and after January 1, 1895, and until January 1, 1900, "there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States." . . . . .

"Sec. 28. That in estimating the gains, profits, and income of any person there shall be included all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the

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\* Marginal note in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 434.

principal and interest of which are by the law of their issuance exempt from all Federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated; interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or coupons; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except that portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including Senators, Representatives, and Delegates in Congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, State, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such

person be owner, tenant, or mortgagor; also losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *Provided further*, That only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interests, the aggregate deduction in their favor shall not exceed four thousand dollars: *And provided further*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of four thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, and shall include that portion of any income or salary upon which a tax has not been paid by the employer, where the employer is required by law to pay on the excess over four thousand dollars: *Provided also*, That in computing the income of any person, corporation, company, or association there shall not be included the amount received from any corpora-

tion, company, or association as dividends upon the stock of such corporation, company, or association if the tax of two per centum has been paid upon its net profits by said corporation, company, or association as required by this Act.

“Sec. 29. That it shall be the duty of all persons of lawful age having an income of more than three thousand five hundred dollars for the taxable year, computed on the basis herein prescribed, to make and render a list or return, on or before the day provided by law, in such form and manner as may be directed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to the collector or a deputy collector of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors, administrators, agents, receivers, and all persons or corporations acting in any fiduciary capacity, shall make and render a list or return, as aforesaid, to the collector or a deputy collector of the district in which such person or corporation acting in a fiduciary capacity resides or does business, of the amount of income, gains, and profits of any minor or persons for whom they act, but persons having less than three thousand five hundred dollars income are not required to make such reports; and the collector or deputy collector, shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated; and in case any such person having a taxable income shall neglect or refuse to make and render such list and return, or shall render a wilfully false or fraudulent list or return, it shall be the duty of the collector or deputy collector, to make such list, according to the best information he can obtain, by the examination of such person, or any other evidence, and

to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of wilful neglect or refusal to make and render a list or return; and in all cases of a wilfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases as of wilful neglect or refusal to render a list or return, or of rendering a false or fraudulent return." A proviso was added that any person or corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. "Any person or company, corporation, or association, feeling aggrieved by the decision of the deputy collector, in such cases may appeal to the collector of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final. If dissatisfied with the decision of the collector such person or corporation, company, or association may submit the case, with all the papers, to the Commissioner of Internal Revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the Commissioner of Internal Revenue, as herein prescribed." Provision was made for notice of time and place for faking testimony on both sides, and that no penalty should be assessed until after notice.

By section 30 the taxes on incomes were made payable on or before July 1 of each year, and five per cent. penalty levied on taxes unpaid, and interest.

By section 31, any non-resident might receive the benefit of the exemptions provided for, and "in computing income he shall include all income from every source, but unless he be a citizen of the United States

he shall only pay on that part of the income which is derived from any sources in the United States. In case such non-resident fails to file such statement, the collector of each district shall collect the tax on the income derived from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such non-resident shall be liable to distraint for tax: *Provided*, That non-resident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against non-resident persons."

"Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, savings institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

The tax is made payable "on or before the first day of July in each year; and if the President or other chief officer of any corporation, company, or association, or in the case of any foreign corporation, company, or association, the resident manager or agent shall neglect or refuse to file with the collector of the internal revenue district in which said corporation, company, or association shall be located or be engaged in business, a statement verified by his oath or affirmation, in such form as

shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, showing the amount of net profits or income received by said corporation, company, or association during the whole calendar year last preceding the date of filing said statement as hereinafter required, the corporation, company, or association making default shall forfeit as a penalty the sum of one thousand dollars and two per centum on the amount of taxes due, for each month until the same is paid, the payment of said penalty to be enforced as provided in other cases of neglect and refusal to make return of taxes under the internal-revenue laws.

“The net profits or income of all corporations, companies, or associations shall include the amounts paid to shareholders, or carried to the account of any fund, or used for construction, enlargement of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporations, companies, or associations.

“That nothing herein contained shall apply to States, counties, or municipalities; nor to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary societies, orders, or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members; nor to the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; nor to building and loan associations or companies which make loans only to their shareholders; nor to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly,

shall not receive deposits to an aggregate amount, in any one year, of more than one thousand dollars from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding ten thousand dollars; fourthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution, or society, except such as shall be applied to surplus; fifthly, shall not possess, in any form, a surplus fund exceeding ten per centum of its aggregate deposits; nor to such savings banks, savings institutions, or societies composed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors; nor to that part of the business of any savings bank, institution, or other similar association having a capital stock, that is conducted on the mutual plan solely for the benefit of its depositors on such plan, and which shall keep its accounts of its business conducted on such mutual plan separate and apart from its other accounts.

“Nor to any insurance company or association which conducts all its business solely upon the mutual plan, and only for the benefit of its policy holders or members, and having no capital stock and no stock or shareholders, and holding all its property in trust and in reserve for its policy holders or members; nor to that part of the business of any insurance company having a capital stock and stock and shareholders, which is conducted on the mutual plan, separate from its stock plan of insurance, and solely for the benefit of the policy holders and members insured on said mutual plan, and holding all the property belonging to and derived from said mutual part of its business in trust and reserve for the benefit of its policy holders and members insured on said mutual plan.

“That all state, county, municipal, and town taxes



paid by corporations, companies, or associations, shall be included in the operating and business expenses of such corporations, companies, or associations.

“Sec. 33. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including Senators and Representatives and Delegates in Congress, when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of two per centum; and the payroll, receipts, or account of officers or persons paying such tax as aforesaid shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of The Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the Treasurer of the United States, or other officer authorized to receive the same. Every corporation which pays to any employé a salary or compensation exceeding four thousand dollars per annum shall report the same to the collector or deputy collector of his district and said employé shall pay thereon, subject to the exemptions herein provided for, the tax of two per centum on the excess of his salary over four thousand dollars: *Provided*, That salaries due to state,

county, or municipal officers shall be exempt from the income tax herein levied."

By section 34, sections thirty-one hundred and sixty-seven, thirty-one hundred and seventy-two, thirty-one hundred and seventy-three, and thirty-one hundred and seventy-six of the Revised Statutes of the United States as amended were amended so as to provide that it should be unlawful for the collector and other officers to make known, or to publish amount or source of income under penalty; that every collector should "from time to time cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects;" that the tax returns must be made on or before the first Monday in March; that the collectors may make returns when particulars are furnished; that notice be given to absentees to render returns; that collectors may summon persons to produce books and testify concerning returns; that collectors may enter other districts to examine persons and books; and may make returns; and that penalties may be imposed on false returns.

By section 35 it was provided that corporations doing business for profit should make returns on or before the first Monday of March of each year "of all the following matters for the whole calendar year last preceding the date of such return:

"First. The gross profits of such corporation, company, or association, from all kinds of business of every name and nature.

"Second. The expenses of such corporation, company, or association, exclusive of interest, annuities, and dividend.

"Third. The net profits of such corporation, company,

or association, without allowance for interest, annuities, or dividends.

"Fourth. The amount paid on account of interest, annuities, and dividends, stated separately.

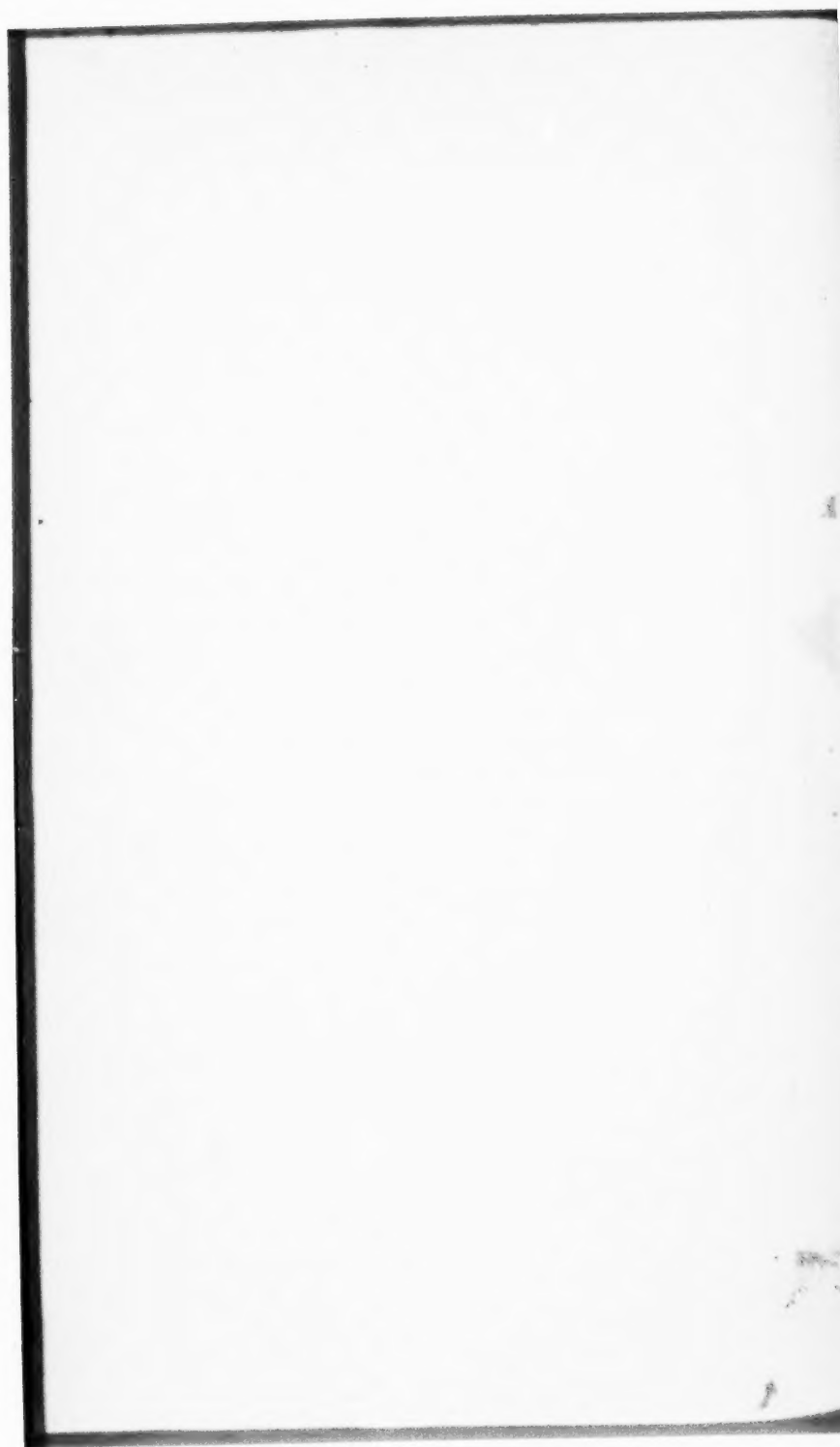
"Fifth. The amount paid in salaries of four thousand dollars or less to each person employed.

"Sixth. The amount paid in salaries of more than four thousand dollars to each person employed and the name and address of each of such persons and the amount paid to each."

By section 36, that books of account should be kept by corporations as prescribed, and inspection thereof be granted under penalty.

By section 37 provision is made for receipts for taxes paid.

By a joint resolution of February 21, 1895, the time for making returns of income for the year 1894 was extended, and it was provided that "in computing incomes under said act the amounts necessarily paid for fire insurance premiums and for ordinary repairs shall be deducted;" and that "in computing incomes under said act the amounts received as dividends upon the stock of any corporation, company, or association shall not be included in case such dividends are also liable to the tax of two per centum upon the net profits of said corporation, company, or association although such tax may not have been actually paid by said corporation, company, or association at the time of making returns by the person, corporation, or association receiving such dividends and returns or reports of the names and salaries of employes shall not be required from employers unless called for by the collector in order to verify the returns of employes."



62561

TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 353-411

FRED W. SMITH, APPELLANT

THE NORTHERN TRUST COMPANY, A. C. BARTLETT,  
WILLIAM A. FULLER, ET AL.

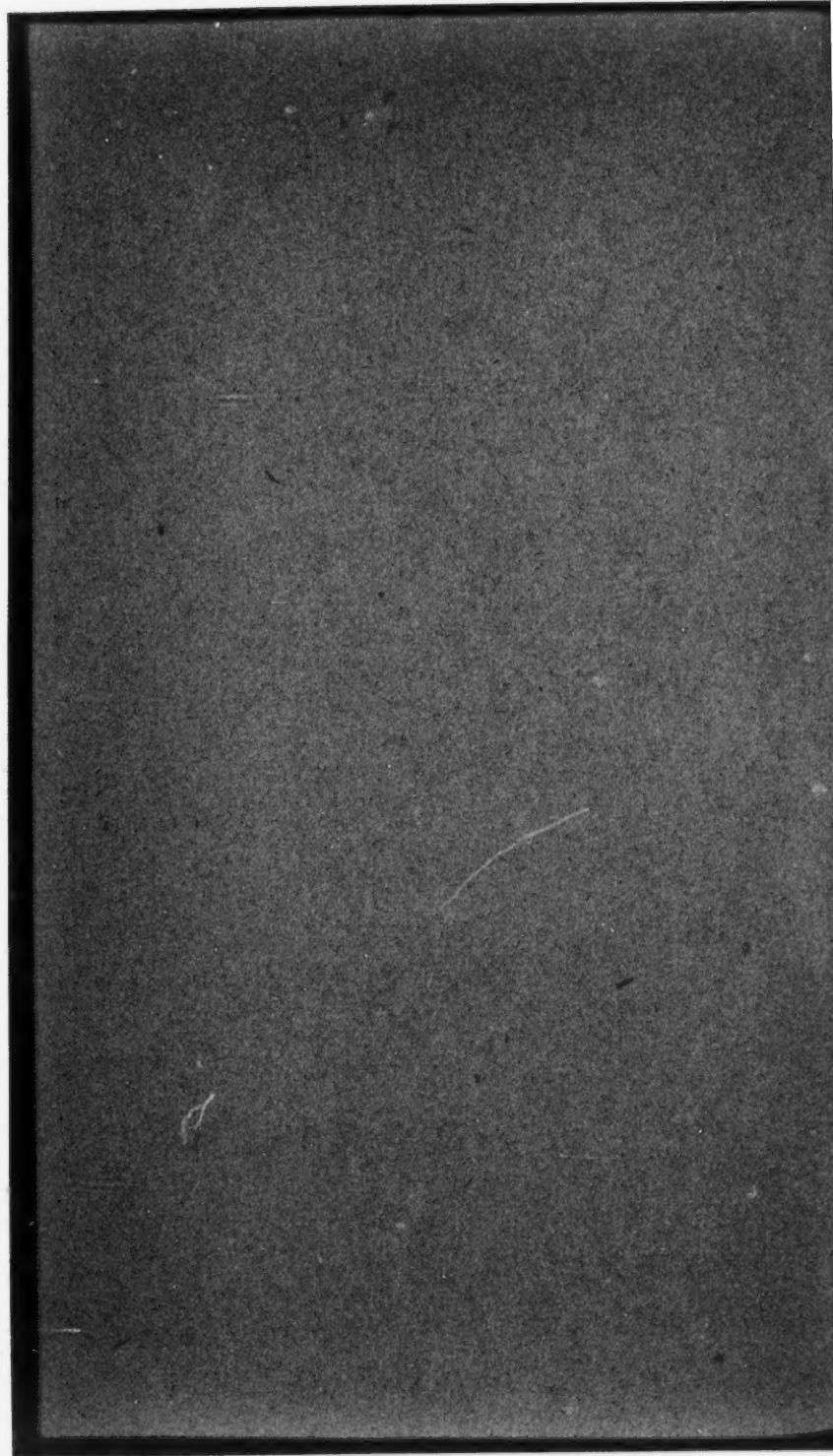
APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

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FILED JANUARY 20, 1907.

(31,979)





(21,979)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 753.

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FRED W. SMITH, APPELLANT,

*vs.*

THE NORTHERN TRUST COMPANY, A. C. BARTLETT  
WILLIAM A. FULLER, ET AL.

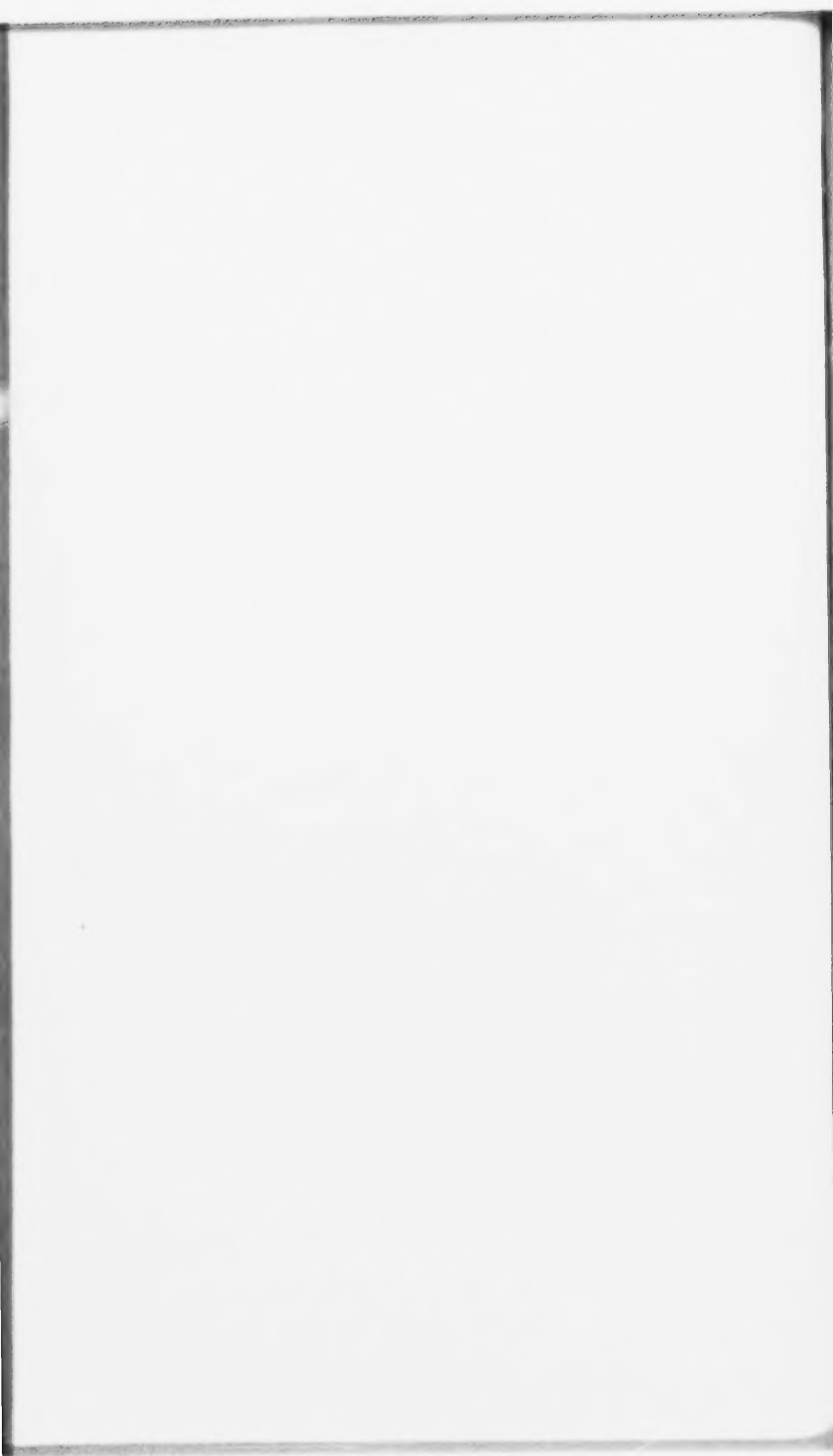
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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

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1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29855.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Messrs. Peckham, Brown, Packard & Walsh, Solicitors for Complainant.

Mr. Edward Osgood Brown, of Counsel.

Messrs. Judah, Willard, Wolf & Reichmann, Solicitors for Defendants.

Mr. Noble B. Judah, of Counsel.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Monday, the twenty-fourth day of January, in the year of our Lord one thousand nine hundred and ten, being one of the days of the regular December Term of said Court, begun Monday, the twentieth day of December, 1909, and of our Independence the one hundred and thirty-fourth year.

H. S. STODDARD, *Clerk.*

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29855.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Be it remembered, That on this day to-wit: the fifteenth day of January, 1910, come- the complainant in the above entitled cause by his solicitors, and filed in the Clerk's office of said Court a certain Bill of Complaint in the words and figures following to-wit:

- 4 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. In Equity.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

*Bill of Complaint.*

Peckham, Brown, Packard & Walsh, Solicitors for Complainant.  
Edward Osgood Brown, of Counsel.

- 5 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. In Equity.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

*Bill of Complaint.*

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, Sitting in Equity:

Fred W. Smith, who is a citizen of the State of Illinois, and a resident of the City of Chicago in the said state and in the Northern District of Illinois aforesaid, brings this his bill of complaint in behalf of himself and all other stockholders of The Northern Trust

6 Company hereinafter named and described, who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit, against The Northern Trust Company, which is a corporation created and existing under and by virtue of the laws of the State of Illinois, located and having its principal office for the transaction of business in the City of Chicago, in the Eastern Division of the Northern District of Illinois, and A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, who are all citizens of the State of Illinois and residents of said Eastern Division of the Northern District of said state, and who are, as hereinafter set forth, directors of the said corporation, The Northern Trust Company.

And thereupon your orator complains and represents unto your Honors as follows:

First. Your orator shows that the defendant, The Northern Trust Company, is a corporation duly organized and existing under and by

virtue of the provisions of an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations with Banking Powers," approved June 16, 1887, and the amendments thereof, approved June 3, 1889, and June 4, 1897, and June 3, 1907.

Reference is prayed to each and all of said acts for the powers and duties of the said defendant Trust Company and of its directors.

The capital stock of said corporation consists of the sum of one million five hundred thousand dollars, divided into fifteen thousand shares of the par value of one hundred dollars each, and as your orator is informed and verily believes, the capital stock, surplus and accumulated profits of said Corporation now exceed the sum of three million five hundred thousand dollars.

Second. Your orator further shows unto your Honors that the said defendant Trust Company was and is authorized by the laws of Illinois, to do a general banking business, except the issuing of bills to circulate as money; to receive deposits and loan money, on personal and real estate security; to take, accept and execute all such trusts of every description as may be committed to said Company by any person or corporation by grant, assignment, devise or bequest or otherwise. By an act of the General Assembly of the State of Illinois, entitled "An Act to Provide for and Regulate the Administration of Trusts by Trust Companies," approved June 15, 1887, as amended by an act approved June 1, 1889, it may be appointed by any court of competent jurisdiction in the State of Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator. Any court in the said state having jurisdiction of any receiver, executor, administrator, conservator, guardian, assignee or other trustee, may order such officer or trustee to deposit any money then in his hands or that may thereafter come to his hands, with said defendant corporation, The Northern Trust Company, and such deposits shall thereafter be paid out only on the orders of said court, but said officer or trustee shall be discharged from further care or responsibility for said funds. Also by said act, whenever in the judgment of any court having jurisdiction of any estate in process of administration by an assignee, receiver, executor, administrator, guardian, conservator or other trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after a hearing on said application, the said court may order the said officer or trustee to deposit with the said defendant corporation, The Northern Trust Company, for safekeeping, such portion of all of the personal assets of said estate as it shall deem proper, and thereupon said court shall, by an order of record, reduce the bond theretofore given by such officer or trustee, and the property so deposited shall thereupon be held by said corporation under the orders and directions of said court. Said corporation is not required to give any bond or security in case of any appointment thus provided for by law, but before accepting any appointment or deposit, was obliged by the statutes of the State of Illinois to deposit with Auditor of Public Accounts of the State of Illinois, for the benefit of its creditors, the sum of \$200,000 in stocks of the United States or municipal bonds of the State of Illinois or in

mortgages on improved and productive real estate in Illinois, and to procure from said Auditor of Public Accounts a certificate that said deposit had been made; said corporation is also required by law to file with the Auditor of Public Accounts of the State of Illinois, during the month of January of each year, a statement under oath of the condition of said corporation on the thirty-first day of December next preceding. The law requires that the said report shall exhibit the following items in the following form:

(a) The assets of said Company, specifying:

First. The description and market value or as nearly as may be of the real estate owned by such Company.

Second. The amount of cash on hand and deposited in banks to the credit of said Company, specifying in what banks such deposits are.

Third. The amount of cash in the hands of agents and in course of transmission.

Fourth. The amount of loans secured by mortgages and bonds constituting a first lien on real estate, on which there shall be less than one year's interest due or owing and the amount of such interest.

Fifth. The amount of such loans on which there shall be more than one year's interest due or owing and the amount of such interest.

Sixth. The amount due the Company on which judgments have been obtained.

Seventh. The amounts of stocks and bonds of the State of Illinois and of the United States, of any incorporated city of the state and of any other stocks and bonds owned by said Company, specifying the amount, number of shares and the par and market value of each kind of stock or bonds.

Eighth. The amount loaned upon the pledges or securities with a statement of the securities so held by said Company and the par and market value of said securities.

Ninth. The amount of all other assets of said Company included accrued interest not enumerated above.

10 (b) The liabilities of said Company, specifying—

First. The capital stock of said Company.

Second. The surplus on hand.

Third. The undivided profits.

Fourth. The deposits held by said Company.

(c) A list and description of the trusts held by said Company, the source of the appointment thereto, and the amount of real and personal estate held by said Company by virtue thereof, except mere trusts. The said report must also be in such form and contain such statements, returns and information as to the affairs, business condition and resources of the corporation as the auditor of public accounts may in each year prescribe or require.

Your orator shows that the said defendant corporation has complied with all the requirements of the law of Illinois in the matters above mentioned (including a deposit with the Auditor of the State of Illinois of the sum of \$200,000 in securities) and that as a matter

of law it was made by the effect of said statutes and its compliance therewith in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois, and your orator shows that as a matter of fact it has under its charter authority and the provisions of the legislation above named been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars.

11 Third. And your orator shows that said Northern Trust Company owns and holds in its own right real estate located in the City of Chicago, Illinois, of the value of more than one million dollars, the larger part of which it uses for its banking offices and part of which is leased out to a tenant for the annual rental of nine thousand dollars; that said defendant Trust Company owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations, of the value of not less than one million four hundred thousand dollars, and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company, are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states.

Fourth. Your orator shows that the net income of the defendant Trust Company received by it from all sources during the year ending December 31, 1909 (exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the corporation tax so-called, alleged as hereinafter set forth to be authorized and provided for in Section 38 of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage industries of the United States and for other purposes," approved August 5, 1909),

12 amounted to the best of your orators' knowledge, information and belief to much more than two hundred and fifty thousand dollars.

Said net income is the amount remaining after deducting from the gross amount of the income of said defendant Trust Company, all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property; interest actually paid within the year on its bonded or other indebtedness; all interest actually paid by it within the year on deposits; all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or by the government of any foreign country as a condition to carrying on business therein, and all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject or purporting to be subject to the so-called "Corporation Tax" above described.

And your orator shows that for many years the net income of The Northern Trust Company computed as above set forth has been more than \$205,000 annually and that as your orator is advised and believes it will continue so to be in the future for successive calendar years, beginning with the year 1910.

13 Fifth. Your orator shows that the real estate above set forth in Paragraph Three of this bill belonging to the defendant Trust Company consists of ground and building situated in the State of Illinois; that said Trust Company derives therefrom income and rents of about \$9,000 per annum, and that said defendant Trust Company derives an income of more than \$50,000 annually from its investments in interest bearing bonds of cities, counties, public parks and other municipal corporations, and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignee and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees with the said defendant corporation.

Sixth. Your orator further shows on information and belief that under and by virtue of the powers conferred upon said defendant Trust Company, it has from time to time taken, accepted and executed and during the year 1909 has held and been executing and still holds and is executing numerous trusts committed to said Trust Company, by numerous persons, copartnerships, unincorporated associations, by grant assignment, devise and bequest and by orders of various courts, and that said Trust Company now holds as  
14 trustees for many minors, individuals, copartnerships, associations and corporations resident in the United States and elsewhere many parcels of real estate exceeding 1,000 in number.

Seventh. Your orator further shows that the affairs, business and property of the said defendant Company are managed and conducted by nine directors and that the defendants A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith are citizens of the State of Illinois, and residents of the Eastern Division of the Northern District of said state, and that said defendants are the directors of the said defendant Trust Company, duly elected as such, and that they are now acting in that capacity and managing and conducting all and singular the affairs and business of said defendant Trust Company.

Eighth. Your orator further shows that he is a citizen of the State of Illinois and a resident of the City of Chicago in the said state and in the Northern District of Illinois aforesaid; that he became the owner and registered holder of 140 shares of the capital stock of the par value of \$14,000 in said defendant Trust Company, before the 15th day of February, A. D. 1906, and that he has ever since been and still is a stockholder therein, owning and holding in his own right said 140 shares of its capital stock, the  
15 value of which 140 shares exceeds the sum of \$40,000. The

capital stock of said Trust Company is divided among a large number of different persons, who, as such stockholders constitute a large body, and this suit is for an object common to them all. Your orator therefore brings this suit in his own name and in his own behalf as a stockholder in said Trust Company, and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

Ninth. Your orator further shows that as he is informed and verily believes, the defendant Trust Company and a majority of its directors who are managing and conducting its property, business, and affairs as aforesaid have determined and resolved that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," approved August 5, 1909, the said defendant Trust Company is liable to pay and that they intend to pay for it to the Federal Government on or before the thirtieth day of June, 1910, a tax equal to one per centum upon the entire net income of the said defendant Trust Company over and above five thousand dollars received by it from all sources during the calendar year ending December 31, 1909, exclusive of amounts received by it

as dividends upon the stock of other corporations, joint

16 stock companies or associations or insurance companies, subject to the same alleged tax, including the income derived

from the real estate which it holds as above set forth and from the public bonds, national, state and municipal, of which it is the owner, and including the income which it derives by virtue of its appointment by the courts of the State of Illinois as trustee, receiver, assignee, guardian, executor or administrator and by virtue of orders of such courts requiring such officers or other trustees, or allowing them voluntarily to deposit the moneys in their hands as such officers or trustees with the said defendant corporation.

Tenth. Your orator further shows that as he is informed and verily believes, in alleged compliance with the requirements of the Act of Congress aforesaid, the defendant Trust Company and its said directors have avowed their intention and propose voluntarily, to make and file with the collector of internal revenue for the First District of Illinois prior to the first day of March, 1910, a statement or return under oath of its president, vice-president or other principal officer and of its treasurer or assistant treasurer, setting forth—

(a) The total amount of its paid up capital stock outstanding on December 31, 1909.

(b) The total amount of its bonded or other indebtedness on said date.

(c) The gross amount of its income received during the year 1909, from all sources, and the amount received by it within the year by way of dividends upon stock of other corporations, joint stock companies or associations or insurance companies, purporting to be subject to the alleged "Corporation Tax"

17 as above described.

(d) The total amount of all the ordinary and necessary expenses



actually paid out of earnings in the maintenance and operation of its business and properties within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition of its continued use or possession of any of its property.

(e) The total amount of all its losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property.

(f) The amount of interest actually paid by it within the year on its bonded or other indebtedness, stating separately all interest paid by it within the year on deposits.

(g) The amount paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof; and

(h) The amount of its net income after making the deductions which the said Act of Congress heretofore described prescribes shall be made from its gross income to ascertain its net income, said deductions being the amounts of the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business, all losses sustained during the year and not compensated by insurance or otherwise, including an allowance for the depreciation of property; interest paid within the year on its bonded or other indebtedness, and the interest actually paid by it within the year on deposits; all sums paid for taxes during the year, and all amounts received within the year as dividends upon stocks of other corporations, joint stock companies or associations or insurance companies subject to the alleged tax.

18 Eleventh. Your orator further shows that he is informed and verily believes that the defendant, the Northern Trust Company, and a majority of its directors who are managing and conducting its affairs as aforesaid, also have taken the position that for each successive year after 1909, the said Trust Company will be liable to pay and that they intend voluntarily to pay for it to the United States on or before the Thirtieth day of June in each successive year a tax equal to one per centum upon the entire net income of the said defendant Trust Company over and above five thousand dollars computed and calculated as in the Tenth Paragraph of this bill set forth and that the said defendant, The Northern Trust Company, and its said directors, will, as your orator is advised, unless restrained by the order of this court as hereinafter prayed, voluntarily make and file with the Collector of Internal Revenue for the First District of Illinois, prior to the first day of March in each successive year after 1910, a statement or return for the year ending on the preceding 31st of December, showing the same matter and items as in said Tenth Paragraph of this bill it is alleged that they intend to make and file with said Collector for the year ending December 31, 1909.

Twelfth. Your orator avers that the provisions of said Act of Congress of August 5, 1909, as above set forth, which are found in the thirty-eighth section thereof, and which purport to render



liable the defendant corporation and all other corporations, joint stock companies or associations organized for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or new or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia (with the exception of certain organizations, associations and corporations which do not include the defendant corporation or any corporation of its nature and class), to pay annually a tax of one per centum upon the entire net income over and above five thousand dollars received by it from all sources during each year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the same tax, or if organized under the laws of any foreign country upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the same tax (the said tax being denominated in said Section 38 of the Act of Congress aforesaid as "a special excise tax with respect to the carrying on or doing business" by corporations, joint stock companies or associations and insurance companies—"equivalent to one per centum upon the entire net income over and above five thousand dollars," etc.), are unconstitutional, null and void, and furnish no justification to the defendant corporation or its directors for the payment of said tax or for the returns to the collector of internal revenue, purporting to be required by said Section 38, which payment and returns the defendant corporation and its directors nevertheless are threatening and purposing to make, claiming that they are required so to do by said provisions of the said Act of Congress.

Thirteenth. Your orator (without conceding that the said provisions of the Act of Congress of August 5, 1909, purporting to levy a tax on corporations as above described, which tax will be for convenience hereafter in this bill designated merely as the Corporation Tax, are otherwise constitutional or valid, but protesting that in other respects than in those particularly enumerated in this bill he is advised and believes them to be unconstitutional, invalid and therefore null and void as applied to the defendant corporation) avers that the provisions of said Corporation Tax incorporated in the said Act of Congress are in conflict with the provisions of the Constitution of the United States and are null and void in the particulars and for the reasons set forth in the paragraphs from the Fourteenth to the Twenty-first, inclusive, of this bill.

Fourteenth. Your orator avers that the said Corporation Tax is a direct tax in respect of the real estate held and owned by the defendant Trust Company, and in respect of its per-

sonal property, and that said direct tax is not in and by said act apportioned among the several states, according to their population, as required by Section 2 of Article I of the Constitution of the United States, and by paragraph four of Section nine of Article I of the Constitution.

Fifteenth. Your orator also avers that if the said Corporation Tax so incorporated in said Act of Congress be held not to be a direct tax, but as denominated in the act (fallaciously, as your orator is advised and believes), "a special excise tax," or falls under any denomination of duties, imposts or excises, or is any other than a direct tax, then its provisions are nevertheless unconstitutional, null and void, in that they are not uniform throughout the United States, as is specifically and explicitly required in and by Section eight of Article I of the Constitution of the United States, as to all "duties, imposts and excises," and as is implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax,

A. Your orator avers that the said Corporation Tax is not uniform as to property, class or subject in that it is imposed on corporations like the defendant corporation, created and organized entirely under the laws of the various states and made by those laws, persons resident in said states having all the rights of natural persons and of citizenship in said states and subject to no visitatorial or other powers of the Federal Government or of the Congress of the United States—in respect to which they are legally in precisely the same relation as are natural persons—but is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying and transacting the same or similar business under like conditions and in the same localities, and having like property and net income.

B. The said Corporation Tax is not uniform even among corporations in that in every state and in almost all localities where the tax would be operative, and notably so in the State of Illinois and City of Chicago, where the defendant corporation is situated, there are a great number of corporations also organized under state laws entirely, the net income of which, computed as the Corporation Tax Law directs, amounts to less than \$5,000 a year, and did not amount to such sum during the year 1909, and that said corporations are equally with natural persons and copartnerships exempted from said Corporation Tax, although it is imposed on other corporations doing similar business under like conditions and having an entire net income greater than \$5,000.

C. The said Corporation Tax is not uniform even among corporations, in that in almost every state and in almost all localities where the tax would be operative, there are a large number of corporations also organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to the said corporation tax, and whose entire income was so derived during the year 1909 and that said corporations by the

effect of the law are equally with natural persons and co-partnerships exempted from said Corporation Tax.

D. The said Corporation Tax is not uniform even among corporations, in that in almost every state and in almost all localities where the tax would be operative there are a large number of corporations, also organized under state laws, which derive part of their income from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to the said corporation tax and part of whose income was so derived during the year 1909 and that the tax upon such corporation is calculated at a different rate from the tax imposed upon other corporations doing similar business under like conditions and having no part of their income derived from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to the said Corporation Tax.

E. Your orator avers that the said Corporation Tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a federal income tax on such persons, many of whom have no other income, while all other persons resident in the United States are exempted from any federal tax on incomes. Thus an Income Tax is imposed on a very small proportion of the population of the United States, from which all other persons are exempted.

F. The said Corporation Tax is not uniform in its effect on corporations alone even, because of the exemptions therein contained of all labor, agricultural or horticultural organizations, all fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and all corporations and associations organized and operated exclusively for religious, charitable or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual, and your orator shows that the said exemptions and classifications are arbitrary and unreasonable and based on no classification which is uniform or equitable, and that many other corporations which by the terms of the Corporation Tax Law would be subject to the Corporation Tax are equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. Your orator further shows that if the Corporation Tax were held to be an excise tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations and liabilities pertaining to a corporate franchise or its exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state. Thus the shareholders of all banking corporations created by the State of Illinois and organized under the Statutes of Illinois, are by the constitution and laws of the State of Illinois, individually responsible and liable to its creditors over and above the amount of stock held by

them respectively, to an amount equal to their respective shares so held for all liabilities accruing while they are such shareholders.

And your orator says that by the National Banking Law, the shareholders of all national banks are individually responsible  
 25      equally and ratably, but not for another, for all contracts, debts and engagements of the Bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount of their shareholdings.

But your orator shows that no such individual liability of shareholders exists in Illinois, in the case of corporations not doing a banking business, and that there is no personal liability on the shareholders of such other corporations, to the creditors of said corporations beyond the amount of their investments in the capital stock.

And on information and belief your orator avers that in some of the states of the United States there is no personal liability beyond the amount of their shareholdings imposed by law on the shareholders of banking corporations created and organized under the laws of said states, and in others there is unlimited personal liability imposed on such shareholders.

Your orator therefore avers that as the privilege of doing business as a corporation—a corporate franchise—is a different thing in one state from that which it is in another, and varies according to the legal requirements and enactments of the respective states which create the corporation and is a different thing as to a corporation like the defendant, created by the Federal Government under the National Banking Act from that which it is as to a corporation organized under state laws, and may be a different thing as to different corporations in the same state—a tax on the mere privilege of existing as a corporation and exercising a corporate franchise, is neither uniform as to the different states of the United States nor as to the corporations within each state.

H. And your orator further shows that in many other respects besides those specifically mentioned in this bill of complaint the said Corporation Tax is not uniform as required by Section 8 of Article I of the Constitution of the United States.

26      Sixteenth. Your orator further shows that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, but to fall under some other denomination, and if it were also held to be uniform throughout the United States within the meaning and intent of the Constitution of the United States, it must still be held to be unconstitutional and void, as not within the power of Congress to enact, and as interfering with the reserved rights and sovereignty of the several states, by which several states, corporations such as the defendant Trust Company were created, and in conflict particularly with the Tenth Article of the Amendments to the Constitution of the United States which reserves to the states the power to grant acts of incorporation as an incident of their sovereignty.

Your orator shows that although called by Congress a special excise tax, the Corporation Tax is not an excise tax. An excise tax,

as your orator is advised and believes, is an occupation tax upon the privilege or license to follow a particular occupation or do a particular kind or kinds of business, and not as is the Corporation Tax a tax upon the privilege of existing as a corporation and exercising a corporate franchise.

But your orator further shows that whether or not the Corporation Tax can be properly regarded as an excise tax, it is a tax either upon the privilege of existing as a corporation, or upon the privilege of doing business in a corporate capacity, and is in conflict with the Constitution of the United States because the supposed  
 27 power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the States to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the States have full power to grant.

Your orator further shows that included in the class of corporations on which the Corporation Tax is imposed are a very great number of public service corporations in the various states which perform public or semi-public functions in the matter of supplying intra-state and intra-municipal transportation, and in supplying water and light and other municipal necessities to municipalities in said states. These public service corporations have been in a great number of cases given the power of eminent domain by the state for the purpose of enabling them to carry out their public or semi-public functions, and they have thus been respectively made the direct instrumentalities and agents of the state creating them with which Congress has no power to interfere. And your orator represents that the inclusion of these corporations in the operation of the Corporation Tax Law would by itself render the same unconstitutional and void.

But your orator further shows that in a wider sense all corporate franchises and all rights granted by a State to exist as corporate entities are instrumentalities of that State in the exercise of its reserve powers and functions and cannot be constitutionally taxed or interfered with by the Congress of the United States.

28 Seventeenth. Your orator further shows that the defendant corporation, the Northern Trust Company, is as before set forth, a creation of the State of Illinois, that by the State of Illinois there has been given to it the authority to perform the various public functions set forth in the second paragraph of this bill, and that it has performed and is performing in many cases the duties imposed on it by the courts of the State of Illinois by their appointment of it, Trustee, Receiver, Assignee, Guardian, Conservator, Executor or Administrator in various respective cases, and that its net income on which the Corporation Tax purports to be imposed or by which it purports to be measured, which your orator charges to be the same thing, is partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed upon it. And your orator thus shows that in a peculiar and especial sense the Corporation Tax is in its case an attempted uncon-

stitutional interference with an instrumentality of the state of Illinois in the discharge of its functions and powers.

Eighteenth. Your orator further shows that though denominated in the act an excise tax the Corporation Tax is in reality as he is advised a tax on the incomes of corporations and that as it is an income tax, its provisions are unconstitutional, null and void, in that they impose a tax upon the incomes of many corporations, including the defendant Trust Company, derived partly from the

29 bonds of the United States and from the bonds of various States of the United States and from municipal bonds of counties and municipalities in said various states, which bonds are among the means and instrumentalities employed for carrying on the governments which issue them, and are not proper subjects of the taxing power of Congress. Said several states, and the counties and municipalities therein, are independent of the general government of the United States and the respective bonds of the said states and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation.

Your orator further shows that as he is informed and believes the bonds of the states, counties and municipalities of the United States which are exempted from federal taxation under the Constitution of the United States amount in the aggregate to a vast sum of which a very large proportion are held by corporations on which the Corporation Tax purports to be imposed, and that the income and interest from said bonds constitute a considerable proportion of the net income of many of such corporations and that it was and is the intention of Congress and is essential and necessary to accomplish the purposes and general scope of the Corporation Tax to lay and collect such tax on the said income derived by corporations from such state, county and municipal bonds, and that such would be the effect of the said Corporation Tax if it were valid.

30 Nineteenth. Your orator further avers that the provisions of said Corporation Tax, incorporated in the Act of Congress as aforesaid, are unconstitutional, null and void in that they impair property rights vested prior to the passage of said act and in that they purport to impose a tax on the net income of corporations, which income accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

Twentieth. Your orator further avers that the provisions of the Corporation Tax incorporated in the Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may under and by virtue of its terms and provisions be deprived of their property without due process of law in violation of Article V. of the Amendments to the Constitution of the United States.

Twenty-first. Your orator further shows that the provisions of said Corporation Tax incorporated in said Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may be compelled to disclose their private books and



papers, in order to make them liable for a penalty or to forfeit their property, and in any event are obliged to make returns of  
31 their private business in such manner that they become public records open to competing and hostile examination although the said corporations making them may have no public functions nor be affected with a public interest. And special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the President of the United States, all of which provisions are in violation of Articles IV and V of the Amendments to the Constitution of the United States.

Twenty-second. Your orator further shows that this suit is brought in good faith and not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance and that he has duly requested the defendant Trust Company and its Directors and each of them in writing to omit and refuse to pay and to refrain from paying said Corporation Tax and to contest the constitutionality of said act, and to refrain from voluntarily making lists, returns and statements to the Collector of Internal Revenue for the Northern District of Illinois (either for the year 1909 or for any subsequent year), and to apply to a court of competent jurisdiction to determine its liability under said act, and that a copy of said request is hereto annexed as Exhibit A, and made a part of this bill of complaint, but that said defendant Trust Company and a majority of its directors, after a  
32 meeting of the directors at which the matter and said request contained in Exhibit A were formally laid before them for action have, as your orator is informed and believes, refused and still refuse and intend omitting to comply with your orator's demand and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the provisions of said Act of Congress and to pay said tax equal to one per cent of its net income for the year 1909, including therein its rents from real estate and its income from municipal bonds and its returns and compensation for acting in the capacities and offices to which it has been appointed by the courts of Illinois and to comply with the provisions of said act in all subsequent years.

A copy of the refusal of said defendant Trust Company to comply with the demand of your orator is hereto annexed as Exhibit B to this complaint.

Your orator further avers that the nine Directors of said defendant Trust Company who are individually made defendants hereto own more than a majority of the entire capital stock of said defendant Trust Company and consequently that any effort which your orator might make to have the stockholders of said defendant corporation prevent the said defendant from paying such taxes on behalf of said corporation would be ineffectual and void.

33 Twenty-third. Your orator further shows that if the defendant and its directors, as they propose and have declared their intention to do, pay said tax out of the net income of the defendant Trust Company, they will thereby diminish the assets of said Trust Company and lessen the dividends thereon and the

value of all its shares, and that said payment will be a misapplication or diversion of its funds by an illegal payment out of its capital or profits; that the directors of said Trust Company are at law and in equity responsible for the disbursements of funds of the Northern Trust Company; that in that respect they occupy a fiduciary relation towards the said Trust Company and that any illegal payment of said funds is an improper diversion of said funds by the directors and a violation of their fiduciary duties to said Northern Trust Company, your orator and other stockholders.

Twenty-fourth. Your orator further shows that the voluntary compliance with the provisions of said corporation tax so incorporated in said Act of Congress aforesaid, will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous shareholders, and that such numerous suits would work irreparable injury to the business of the Company, and involve it in great and irreparable damage, to the irreparable damage also of your orator and all its shareholders.

Twenty-fifth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds exclusive of interest and costs the sum or value of five thousand dollars, and arises under the Constitution and Laws of the United States,  
34 and involves the construction of the Constitution of the United States and the constitutionality and validity of an Act of Congress.

Twenty-sixth. And your orator shows that the actings, doings and pretenses of the defendants before set forth are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable,

Your Orator Prays:

I. That it may be adjudged and decreed that the said provisions imposing a Corporation Tax, incorporated in said Act of Congress approved August 5, 1909, are unconstitutional, null and void.

II. That the defendants be restrained from voluntarily complying with the provisions of said act and making the return or statement above referred to and described, which they threaten to make, and from paying the tax aforesaid, either for the year 1909, or for any subsequent year in which the net income of the defendant Trust Company may exceed the sum of \$5,000.

III. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

35 To the End, Therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said The Northern Trust Company, Chicago, under its corporate seal, and the said individual de-



defendants, not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto.

May it please your Honors to grant unto your orator a *subpœna ad respondendum* issuing out of and under the seal of this Honorable court, to be directed to the said defendants, The Northern Trust Company, Chicago; A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson; Albert A. Sprague, Solomon A. Smith and Byron L. Smith, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and further to perform and abide by such further order and decree as to your Honors shall seem meet.

And also grant unto your orator an order to issue a writ of temporary or provisional injunction restraining the defendants as herebefore prayed until the further order of the court, and that on the hearing of this cause the said injunction be made perpetual.

And your orator as in duty bound will ever pray.

FRED W. SMITH,  
PECKHAM, BROWN, PACKARD & WALSH,  
*Solicitors for Complainant.*

EDWARD OSGOOD BROWN,  
*Of Counsel.*

36 UNITED STATES OF AMERICA,  
*Northern District of Illinois, Northern Division:*

STATE OF ILLINOIS,  
*County of Cook, ss:*

Fred W. Smith, being duly sworn, doth depose and say that he is the complainant in the foregoing bill of complaint; that he has read the bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief or as matters of law, and that as to those matters he believes it to be true.

FRED W. SMITH.

Subscribed and sworn before me this 15th day of January, A. D. 1910.

[SEAL.]

JOHN F. HAGEY,  
*Notary Public.*

## EXHIBIT A.

CHICAGO, January —, 1910.

To A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, Byron L. Smith, Directors of the Northern Trust Company, Chicago.

GENTLEMEN: I am a shareholder in the Northern Trust Company, Chicago, and am informed that the Company intends voluntarily to comply with the requirements of the provisions relating to a "Corporation Tax" contained in the 38th section of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," enacted at the recent special session of Congress and approved by the President August 5, 1909, and commonly called the Tariff Act. I claim that the said provisions of said Act of Congress purporting to impose a "Corporation Tax" are unconstitutional. As a shareholder in said Trust Company I hereby protest against any action of the Company and its directors in voluntarily complying with said "Corporation Tax" provisions and I request that said Trust Company and its directors shall refrain from voluntarily complying with any of said provisions and from voluntarily paying the "Corporation Tax" provided for therein, and from voluntarily making any returns or statements in compliance with said provision to the collector of internal revenue for this district.

I further request that said Company and its directors shall contest the constitutionality of said act and protect its shareholders and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the Trust Company's shareholders.

Very truly yours,

FRED W. SMITH.

## EXHIBIT B.

JAN. 11, 1910.

Fred W. Smith, Esq., 57 Board of Trade, Chicago.

DEAR SIR: Referring to your letter of the 3rd instant addressed to the Directors of this Company, we have to say that the Board of Directors at its meeting this day held considered the matter and we enclose a certified copy of the resolution which was passed in relation to your request.

Yours very truly,

THE NORTHERN TRUST CO.,  
By ARTHUR HEURTLEY, *Secretary*.

*Enclosure.*

At a meeting of the Board of Directors of The Northern Trust Company, held at its office on Tuesday, January 11, 1910, the following resolution was unanimously adopted:

Resolved, that the Board of Directors of The Northern Trust Company deem it inexpedient to comply with the demand of Mr. Fred W. Smith, on the ground that failure to comply with the provisions of the Corporation Tax Law would subject this Company to litigation with the United States.

I, Arthur Heurtley, Secretary of The Northern Trust Company, do hereby certify that the above and foregoing is a true and correct copy of a resolution unanimously adopted at a meeting of the Board of Directors of The Northern Trust Company, held at its office on the 11th day of January, 1910.

In Witness Whereof, I have hereunto set my name and the corporate seal of The Northern Trust Company, this 11th day of January, A. D. 1910.

ARTHUR HEURTLEY, *Secretary.*

(Endorsed:) Filed Jan. 15, 1910. H. S. Stoddard, Clerk.

39 And on to wit, the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and enter their appearance in words and figures following, to-wit:

40 *Appearance of Defendants.*

UNITED STATES OF AMERICA,  
*Northern District of Illinois, Eastern Division, ss:*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29855.

FRED W. SMITH  
vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

We hereby enter the appearance of each of the defendants in the above entitled cause, and of ourselves as their solicitors.

JUDAH, WILLARD, WOLF &  
REICHMANN,  
*Solicitors for Defendants.*

NOBLE B. JUDAH,  
*Of Counsel.*

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

41 And on to-wit: the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and filed in the clerk's office of said court in said entitled cause their

certain Demurrer to the Bill of Complaint in the words and figures following to-wit:

42

*Demurrer.*

UNITED STATES OF AMERICA,

*Northern District of Illinois, Eastern Division, ss:*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29855.

FRED W. SMITH

VS.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith.

The Joint and Several Demurrer of Each and All of the Defendants in the Above-Entitled Cause to the Bill of Complaint of Fred W. Smith, Complainant Therein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, to demur to the said Bill, and for cause of demurrer, show that the said complainant has not, in and by his said Bill, made or stated such a case as doth or ought to entitle him to any relief from or against these Defendants, or any of them, touching the matters contained in the said Bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill of Complaint, these Defendants do demur  
43 to the said Bill, and to all the matters and things therein contained, and they pray the judgment of this honorable Court, whether they, or either of them, shall be compelled to make any further or other answer to the said Bill; and they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

THE NORTHERN TRUST COMPANY,  
A. C. BARTLETT,  
WILLIAM A. FULLER,  
ERNEST A. HAMILL,  
MARVIN HUGHITT,  
CHARLES L. HUTCHINSON.  
MARTIN A. RYERSON,  
ALBERT A. SPRAGUE,  
SOLOMON A. SMITH,  
BYRON L. SMITH.

Each by JUDAH. WILLARD, WOLF &  
REICHMANN, *Their Solicitors.*

NOBLE B. JUDAH,  
*Of Counsel.*

I certify that in my opinion the foregoing demurrer of the defendants to the Bill of Complaint herein, is well founded in law and proper to be filed in the above cause.

NOBLE B. JUDAH,  
*Of Counsel for Defendants.*

44 UNITED STATES OF AMERICA,  
*Northern District of Illinois, ss:*

Athur Heurtley, being first duly sworn, on oath, deposes and says that he is the Secretary of The Northern Trust Company, one of the defendants in the above entitled cause; that he has read the foregoing demurrer to the Bill of Complaint in said cause; that the same is not interposed for the purpose of delaying said cause, or any proceedings therein.

ARTHUR HEURTLEY.

Subscribed and sworn to, before me, this 24th day of January, A. D. 1910.

[SEAL.]

IRVING M. L. HOUSON,  
*Notary Public.*

(Endorsed:) Filed January 24, 1910. H. S. Stoddard, Clerk.

45 And on the same day to-wit: the twenty-fourth day of January, 1910, being one of the days of the regular December Term of said Court, 1909, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

46 *Decree of January 24, 1910, Sustaining Demurrer and Allowing Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant.

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, Defendants.

This cause having come on to be heard upon the Bill of Complaint and the Demurrer thereto heretofore filed herein, and the Court being fully advised in the premises,

It is ordered that the said demurrer be and the same is hereby sustained and that the Bill of Complaint of the Complainant herein be and the same is hereby dismissed at Complainant's costs.

Thereupon the above named Complainant states to the Court that in this case the constitutionality of a law of the United States is drawn in question and prays an appeal from said final decree, dismissing the Bill of Complaint herein, direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. And the Court being fully advised in the premises, and an assignment of errors having been duly filed,

It is ordered that the said appeal to the Supreme Court of the United States be and the same is hereby allowed as prayed for upon the Complainant filing his appeal bond in the usual form in the penal sum of Five Hundred Dollars, and the said defendants now admit in open court due notice of said appeal and duly waive service of any citations thereon.

47 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the clerk's office of said Court his certain Petition for appeal in the words and figures following to-wit:

48

*Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, Defendants.

The above named Complainant, conceiving himself to be aggrieved by the order or decree made and entered in the above entitled cause on January 24, A. D. 1910, dismissing the Bill of Complaint herein for want of equity, hereby appeals from said order or decree to the Supreme Court of the United States for the reasons specified in the Assignments of Error filed herein and prays that this appeal may be allowed and that a transcript of the record and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

PECKHAM, BROWN, PACKARD &  
WALSH,

*Counsel for Complainant.*

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

49 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the clerk's office of said Court in said

entitled cause his certain assignment of errors in the words and figures following to-wit:

50 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Earnest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, Defendants.

Now comes Fred W. Smith, Complainant herein, and files the following Assignments of Error to the decree of the Circuit Court herein, upon which he relies for grounds of reversal on appeal:

1. The said Circuit Court erred in sustaining the demurrer of the defendants to the Bill of Complaint herein.

2. The said Circuit Court erred in dismissing the Bill of Complaint herein at the Complainant's costs.

3. The said Circuit Court erred in not over-ruling the demurrer herein and entering a decree in accordance with the prayer of the Complainant's bill.

FRED W. SMITH,  
By PECKHAM, BROWN, PACKARD &  
WALSH, *His Solicitors.*

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

51 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause and filed in the clerk's office of said court a certain Bond on appeal in the words and figures following to-wit:

52 *Bond on Appeal.*

Know all men by these presents, That we, Fred W. Smith, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, in the full and just sum of Five Hundred Dollars (\$500.00) to be paid to the said The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and

Byron L. Smith, their certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a term of the United States Circuit Court for the Northern District of Illinois, Eastern Division, in a suit depending in said Court, between Fred W. Smith, as complainant, and The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, as defendants, a decree was rendered against the said Fred W. Smith, complainant, and the said Fred W. Smith having prayed for an appeal to reverse said decree and the same having been allowed by said Circuit Court, and the issuance of a citation having been expressly waived in open court by the said defendants.

53 Now, the condition of the above obligation is such, That if the said Fred W. Smith shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and and virtue.

FRED W. SMITH. [SEAL.]  
FIDELITY & DEPOSIT COMPANY  
OF MARYLAND,

[SEAL.]

By ARTHUR C. ARNOLD,  
*Agent and Attorney in Fact.*

Approved January 24, 1910,  
KOHLSAAT,  
*Circuit Judge.*

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

54 NORTHERN DISTRICT OF ILLINOIS,  
*Eastern Division, ss:*

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court in the cause entitled Fred W. Smith vs. The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed

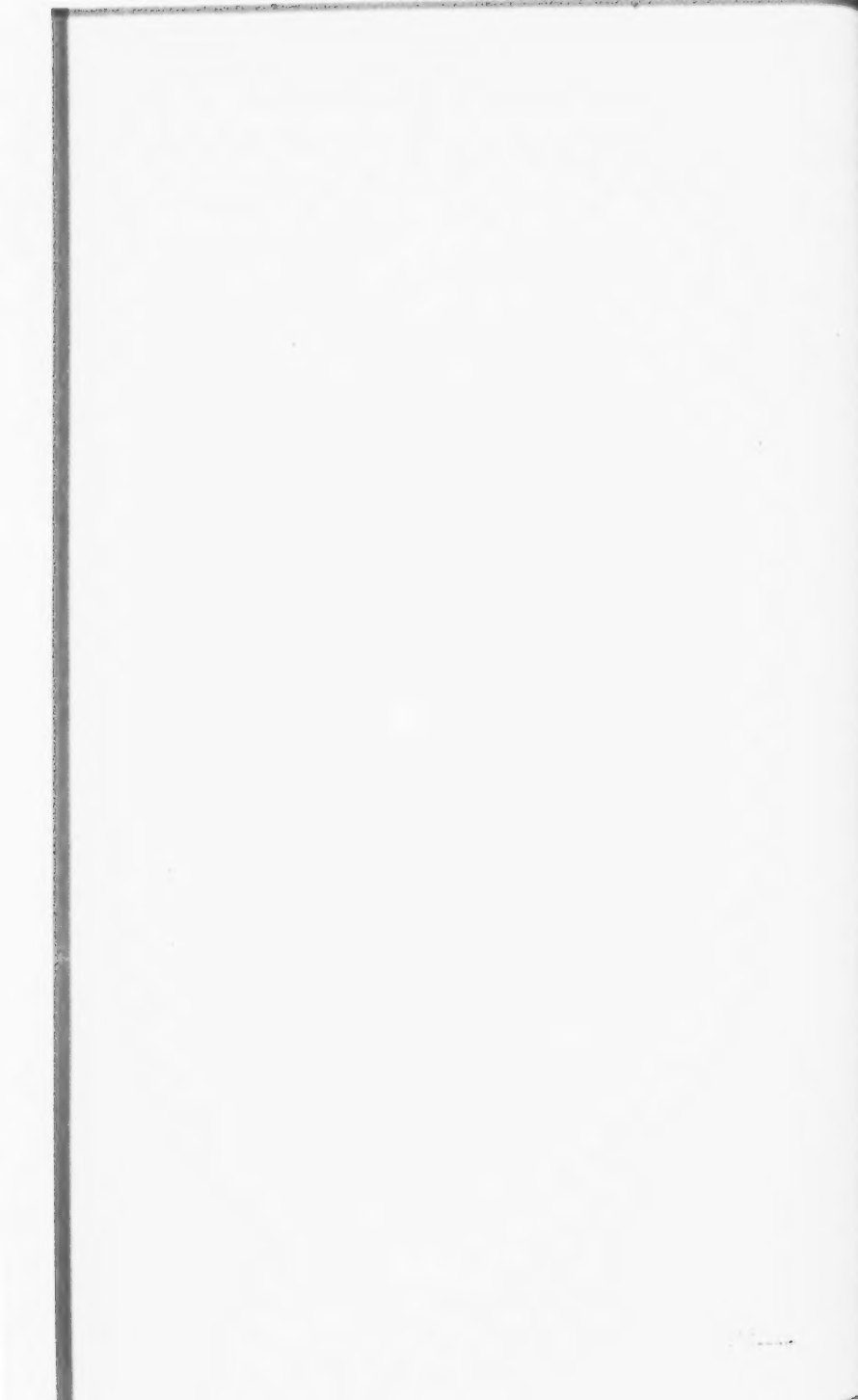


the seal of said Court, at my office in the city of Chicago, in said District, this twenty-fourth day of January, 1910.

[Seal of Circuit Court U. S., Northern District Illinois,  
1855.]

H. S. STODDARD, *Clerk*,  
By JOHN H. R. JAMAR,  
*Chief Deputy Clerk*.

Endorsed on cover: File No. 21,979. N. Illinois C. C. U. S. Term No. 753. Fred W. Smith, appellant, vs. The Northern Trust Company, A. C. Bartlett, William A. Fuller, et al. Filed January 26th, 1910. File No. 21,979.



UNITED STATES SUPREME COURT

October Term, 1907

No. 100

FRANK J. MATH

PLAINTIFF IN ERROR

vs.

THE NATIONAL TRUST COMPANY

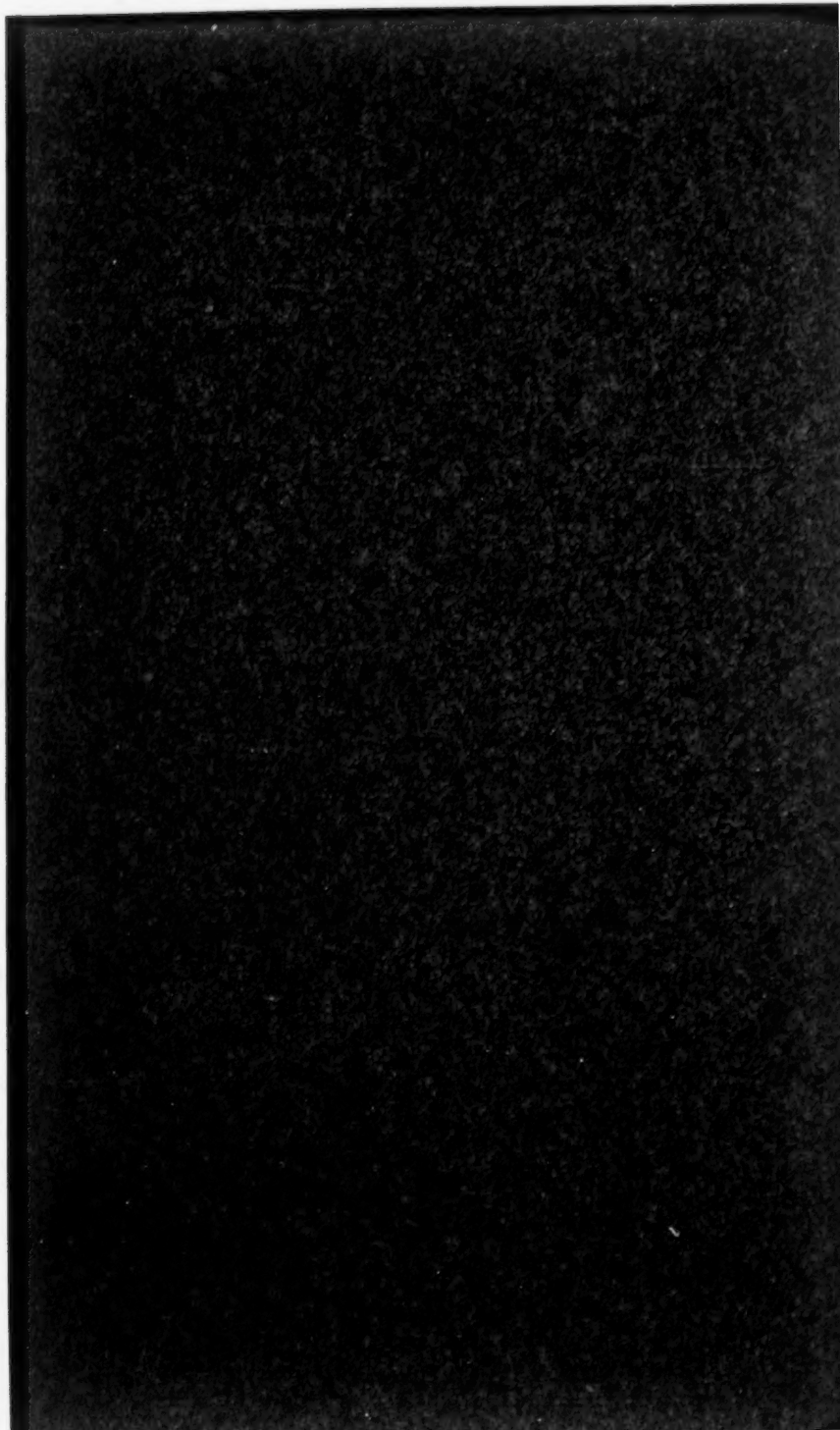
DEFENDANT

ON WRIT OF HABEAS CORPUS

AND FOR WRIT OF HABEAS CORPUS

AND FOR WRIT OF HABEAS CORPUS

(117)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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No. 753.

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FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY ET AL.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS.

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**MOTION TO ADVANCE UNDER RULE 26.**

*To the Honorable the Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

Now comes Fred W. Smith, appellant herein, and respectfully moves this honorable court that the above-entitled cause may be advanced upon the docket of this court and set down for argument and hearing at an early date to be fixed by the court herein, and for grounds of said motion shows to the court as follows:

I.

In this case Fred W. Smith, a stockholder of The Northern Trust Company, filed his bill against said company and its directors to restrain the defendants from complying with the provisions of section 38 of an act of Congress of the United

States entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, by making and filing with the collector of internal revenue for the First District of Illinois, prior to the first day of March, 1910, the statement or return required under the provisions of said act, and by paying on or before June 30, 1910, the tax provided for by said act upon the entire net income of the said defendant, The Northern Trust Company. The bill further prayed that it might be adjudged and decreed that said section 38 of said act, otherwise known and referred to as the Corporation Tax Act, should be adjudged to be unconstitutional and null and void.

## II.

The defendants filed a general demurrer to this bill, and upon their motion the demurrer was sustained, the bill dismissed, and an appeal to this court prayed and allowed.

## III.

The facts as alleged in the bill show that the defendant is the owner of one hundred and forty shares of the capital stock of the corporation of a par value aggregating \$14,000; that the directors of the corporation have determined that it is liable to pay and that they intend to pay for it to the Federal Government on or before June 30, 1910, the tax provided by the act, and that it is their intention and purpose voluntarily to file with the collector of internal revenue the statement or return under oath of its president, vice-president, or other principal officer, setting forth the assets and income of said corporation, as provided for by said act; and that the directors have taken the position that they, each successive year after 1909, intend voluntarily to pay, in each successive year, the amount of the tax provided for by the act.

## IV.

The Northern Trust Company, as shown by the bill, is a corporation authorized by the laws of Illinois to do a general banking business, to receive deposits and loan money on personal and real-estate security, and is authorized by the laws of Illinois to accept and execute trusts of every description, and is further authorized to act under the appointment of any court of competent jurisdiction as trustee, receiver, assignee, guardian, conservator, executor, or administrator. The bill further shows that the trust company owns and holds in its own right real-estate worth more than one million dollars, and that it owns and holds interest-bearing bonds of cities and other municipal corporations worth not less than one million four hundred thousand dollars, and that a large portion of the income of said trust company is derived from the sources above mentioned.

## V.

The bill alleges that the provisions of section 38 aforesaid, referred to as the Corporation Tax, are in conflict with the provisions of the Constitution of the United States, and are null and void because:

(1) The tax is a direct tax and is not apportioned among the several States according to their proportion, as required by section 2, article 1, and paragraph 4 of section 9 of article 1 of the Constitution.

(2) If the tax is not a direct tax, but can be held to be a duty, impost or excise, then the provisions of the law are unconstitutional as not being uniform, as required by section 8, article 1, of the Constitution of the United States.

(3) Even if the Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also

held to be uniform throughout the United States, it is unconstitutional as not being within the power of Congress to enact, since it interferes with the reserved rights and sovereignty of the several States, by which State corporations such as the said appellee The Northern Trust Company were created, and in conflict particularly with article 10 of the amendments to the Constitution of the United States.

## VI.

The matters involved herein are of great and general public interest and importance, and unless an adjudication by this honorable court as to the constitutionality of the law in question is speedily obtained, a great number of corporations affected by the provisions of this act will pay the amount of the tax levied against them under a protest and commence actions to recover the same, thereby involving the representatives of the United States Government in a multiplicity of suits.

## VII.

This appellant is advised that a motion to advance under Rule 26 was filed herein on January 24, 1910, by the appellant in the case of Flint *vs.* The Stone Tracy Company, No. 747 on the docket of this court. This last-mentioned case involves the constitutionality of the Corporation Tax Law, and this appellant is also advised that the questions raised by him in his bill of complaint as aforesaid are in many respects different, and raise other considerations than, and different considerations from, those raised by and involved in the said Flint case with respect to the constitutionality of said act.

## VIII.

This appellant therefore prays this honorable court that this case may be advanced upon the docket under the provis



ions of Rule 26 of this court, to be set down at an early day for argument and hearing.

A notice of this motion has been served upon counsel for the appellees and proof of service filed with the clerk of this court, and the Solicitor General of the United States has been notified that this motion would be submitted.

Respectfully submitted,

ORVILLE PECKHAM,  
EDWARD OSGOOD BROWN,  
GEORGE PACKARD,  
VINCENT J. WALSH,  
*Counsel for Appellant.*



Office Supreme Court U. S.  
FILED  
MAR 7 1910  
JAMES M. BAKENNY,  
Clerk.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1909.

No. 708. 411

FRED W. SMITH,  
*Appellant.*

vs.

THE NORTHERN TRUST COMPANY AND OTHERS,  
*Appellees.*

Appeal from the Circuit Court of the United States for the  
Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

EDWARD GEORGE BROWN,  
*Of Counsel for Appellant.*

GEORGE PARKARD and  
VINCENT J. WALSH,

*Also of Counsel.*

PARKARD, BROWN, PARKARD & WALSH,  
*Attorneys for Appellees.*

Printed at the Supreme Court Press.



IN THE  
Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

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FRED W. SMITH,  
*Appellant,*

*vs.*

THE NORTHERN TRUST COMPANY AND OTHERS,  
*Appellees.*

---

Appeal from the Circuit Court of the United States for the  
Northern District of Illinois.

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STATEMENT OF THE CASE.

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This is an appeal from the Circuit Court of the United States for the Northern District of Illinois from a decree of that court sustaining a general demurrer to a bill in equity filed by the complainant and dismissing the bill at complainant's costs.

The appeal was taken direct to this court because the constitutionality of an act of Congress is involved. Except a possible question of jurisdiction, settled, as we understand, by previous decisions of this court, there is indeed no other matter involved in

the appeal than the constitutionality of Section thirty-eight of the Act of Congress entitled, "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States and for Other Purposes," approved August 5, 1909, and commonly known as "The Corporation Tax Law" of the United States.

The bill alleges in detail and in apt, artificial language that the complainant, Fred W. Smith, is a resident and citizen of Illinois and the owner and registered holder of one hundred and forty shares (of the par value of fourteen thousand dollars) of the stock of the principal defendant, The Northern Trust Company, a corporation organized and existing under various acts of the General Assembly of Illinois; that he is informed and believes that the said Northern Trust Company and its directors, whom he makes defendants to the bill, intend voluntarily to make a return to the Collector of Internal Revenue for the First District of Illinois, of the net income of the Northern Trust Company, and of the other matters required to be stated in relation to its business for 1909, within the time required by the act for such return, and to pay, within the time required by the act for such payment, the tax of one per centum on its entire net income over five thousand dollars, provided for by said act. This tax

would, according to the allegations of the bill, be more than two thousand dollars, the net income of the defendant corporation for the year 1909 being over \$250,000.

The complainant alleges that the provisions of said Section 38 of the Act of August 5, 1909, are unconstitutional, null and void and furnish no justification for the payment of said tax or for the return as contemplated and intended by the defendants, and that he has requested the defendant Company and its directors to refuse to pay the tax for said Company or to make the return, and to contest the constitutionality of the law, but that they have refused his request; and that as the directors of said Northern Trust Company own more than a majority of the entire capital stock of said Company, no effort on the part of the complainant looking to action of the stockholders to prevent the return or payment could be effectual.

The payment of the tax, the complainant alleges, would be a misapplication or diversion of the funds of the defendant corporation by its directors to the injury of the complainant, and a violation of the fiduciary duties of said directors to the complainant and the other stockholders.

Wherefore, the complainant asks an injunction against the defendants voluntarily making either re-

turn or payment under the law in question, which he asks may be adjudged unconstitutional, null and void.

The bill in its successive paragraphs, from the first to the seventh, describes the nature, the business and the property of the defendant the Northern Trust Company; showing that its capital stock, surplus and accumulated profits exceed \$3,500,000; that it is by law authorized to do a general banking business and to take and execute trusts, and that it may, by express statute of the State of Illinois, be appointed by any court of competent jurisdiction in Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator; and that any such court, also by express statute, may order any such officer of which it has jurisdiction to deposit any funds in his hands, as such officer, with the said Northern Trust Company, and thereafter the officer shall be relieved from further responsibility for said funds.

To qualify itself to act under these laws the complainant was obliged to and did make certain deposits with the Auditor of Public Accounts of the State of Illinois, and to make certain reports of its affairs and business to said Auditor.

Thus, the complainant alleges, the Northern Trust Company

“was made by the effect of the statutes of Illi-



nois and its compliance therewith, in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois,"

and has as a matter of fact been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments, now holds, and is administering real and personal property of the aggregate value of many millions of dollars.

It is also alleged that the said Northern Trust Company owns and holds in its own right real estate in Chicago of the value of more than one million dollars, part of which is leased out to a tenant for the annual rental of nine thousand dollars.

That said defendant Trust Company

"owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by the Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states,"

and that said defendant Trust Company derives nine thousand dollars of its income annually from the rents of its absolutely owned real estate, more than fifty thousand dollars annually from its investments in interest bearing bonds of municipal corporations,

and a considerable and valuable income from its frequent appointment by the courts as Trustee, Receiver, Assignee, Guardian, Conservator, Executor, Administrator, and from the orders made by courts requiring or allowing such officers to deposit moneys with it.

The bill also alleges that the defendant the Northern Trust Company, has held and is executing numerous trusts, committed to it by various parties and by various means and holds as trustee for many minors, individuals, copartnerships, associations, and corporations resident in the United States and elsewhere, many parcels of real estate exceeding a thousand in number.

The bill contains in its successive paragraphs from 14 to 21, particular averments concerning the unconstitutionality of said Corporation Tax Law.

Thus:

**PARAGRAPH FOURTEEN :**

Asserts that the said law is a direct tax in respect to the real estate held and owned by the Northern Trust Company and in respect to its personal property, and that although a direct tax, it is not apportioned among the states in proportion to their population as required by Section 2 and by Paragraph 4 of Section 9 of Article 1 of the Constitution.

PARAGRAPH FIFTEEN:

Asserts that if the Corporation Tax should not be held a direct tax, but to fall under the denomination of an "Excise Tax" or any other than a "Direct Tax," then the provisions of the law are unconstitutional because they are not *uniform* throughout the United States. Uniformity, the bill claims, is explicitly required by Section 8 of Article 1 of the Constitution of the United States, as to all "duties, imposts, and excises," and is "implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

Subdivisions of this Paragraph 15, assert

A. That the Corporation Tax is not uniform as to *property, class or subject*, because although imposed upon corporations created and organized entirely under state laws and made by those laws persons resident in said states with all the rights of natural persons and of citizenship in those states, it is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying on the same or similar business under

like conditions and in the same localities and having like property and income.

B. That the said tax is not uniform even among corporations, as a great number of corporations, notably in Chicago where the defendant corporation is situated, having a less net income for 1909 than \$5,000, are exempted from the operation of the tax.

C. That the said tax is not uniform even among corporations in that in almost all localities where the tax would be operative there are a large number of corporations organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies and associations and insurance companies subject to said Corporation Tax, and whose entire income was so derived during the year 1909, and that said corporations by the effect of the law are equally with natural persons and copartnerships exempted from said Corporation Tax.

D. That the said tax is not uniform because of the existence of a large number of corporations organized under state laws, which derive a part of their income from such dividends from other corporations and that the tax upon such corporations is calculated at a different rate from the tax imposed upon other corporations doing a similar business under like con-

ditions, and deriving no part of their income from such dividends.

E. That the tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a Federal Income Tax on such persons while all other persons resident in the United States are exempt from any Federal Income Tax.

F. That the tax is not uniform in its effect upon corporations alone even, because of the exemptions therein contained of certain organizations named; said exemptions and classifications being arbitrary and unreasonable and based on no uniform or equitable classification, and many other corporations which by the terms of the Corporation Tax Law are subject to the Corporation Tax being equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. That if the Corporation Tax were held to be an Excise Tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations, and liabilities pertaining to a corporate franchise or its

exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state.

Illustrations are pointed out in the bill of this variance and it is asserted that a tax on the privilege of existing as a corporation and exercising a corporate franchise is neither uniform as to the different states of the United States nor as to the corporations within each state. Thus geographical as well as other uniformity is lacking.

H. That the tax is not uniform in other respects not specifically pointed out.

**PARAGRAPH SIXTEEN :**

Asserts that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also held to be uniform throughout the United States within the meaning of the Constitution of the United States, yet it must be held unconstitutional and void, as interfering with the reserved rights of the states under the 10th Amendment to the Constitution.

In this paragraph it is more particularly alleged that the tax in question is not an excise tax, but whether so or not is, if not a direct tax on property or income, either a tax upon the privilege of existing as a corporation or a tax upon the privilege of doing business in a corporate capacity. In either

case the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the states have full power to grant.

It is further alleged that the tax is imposed on a great number of public service corporations in the various states, which perform public and semi-public intra-state functions, and have been given the power of eminent domain by the state for the purpose of enabling them to carry out said functions, and have thus respectively been made the direct instrumentalities and agents of the state creating them, with which Congress has no power to interfere.

The inclusion of these corporations in the operation of the law would by itself, it is alleged, render the law unconstitutional, but it is also claimed that in a wider sense all corporate franchises and all rights granted by a state to exist as corporate entities are instrumentalities of that state in the exercise of its reserved powers and functions, and cannot be constitutionally taxed or interfered with by the Congress of the United States.

**PARAGRAPH SEVENTEEN :**

Alleges that the reasons for holding the law unconstitutional, alleged in paragraph sixteen, apply

with especial force to the case of the defendant corporation in that it is a creation of the State of Illinois, that there has been given to it by the state the authority to perform the various public functions set forth in the second paragraph of the bill, and that by the courts of Illinois it has been given the responsibilities and placed under the obligations of such performance in many cases, and that the net income on which the Corporation Tax is imposed, or by which it purports to be measured, is in its case partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed on it.

**PARAGRAPH EIGHTEEN :**

Alleges the tax to be unconstitutional because it is an income tax upon the incomes of many corporations, including the defendant corporation, derived partly from state bonds and municipal bonds issued under state authority, and United States bonds, and that these bonds are not within the taxing power of Congress.

It is particularly alleged in this paragraph that the respective bonds of the state and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation; and



That the income and interest from said bonds constitute a considerable proportion of the net income of many of the corporations on which the Corporation Tax purports to be imposed, and that it was and is the intention of Congress and is essential and necessary to accomplish the purpose and general scope of the Corporation Tax; that these corporations and the income thus derived should be covered by the law.

PARAGRAPH NINETEEN:

Alleges the provisions of the Corporation Tax Law to be unconstitutional in that they impair property rights vested prior to the passage of the act, and in that they purport to impose a tax on the net income of corporations which accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

PARAGRAPH TWENTY:

Alleges the law in question to be unconstitutional in that all corporations thereby taxed, may, under its provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution.

## PARAGRAPH TWENTY-ONE:

Alleges that the provisions of the Corporation Tax Law are unconstitutional in that all corporations thereby taxed may be compelled to disclose their private books and papers in order to make them liable to a penalty or to forfeit their property, and in any event are obliged to make returns of their private business in such manner that they become public records, open to competing and hostile examination, although the said corporations making them may have no public functions nor be affected with a public interest, and in that special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the president, all of which provisions are in violation of Articles IV and V of the Amendments to the Constitution.

There are formal allegations in the bill negating collusion to confer jurisdiction and asserting as grounds of jurisdiction additional to that of the threatened diversion of funds by the directors and breach thereby of their fiduciary duties, that the voluntary compliance with the provisions of the law will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous

shareholders, and that such numerous suits would work irreparable injury to the business of the defendant Company and the irreparable damage of its stockholders.

To this bill there was filed a joint and several demurrer of each and all of the defendants.

The Circuit Court, as above indicated, sustained the demurrer and dismissed the bill and this appeal was taken.

It was advanced for hearing under Rule 26.

## ASSIGNMENT OF ERRORS.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that the Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

## BRIEF OF ARGUMENT.

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I.

Our bill (abstracted in the "Statement") sets out in Paragraphs and Sub-paragraphs—pages 2 to 15—the various grounds on which we attack the constitutionality of the Corporation Tax Law. We rely on them all but to avoid burdening the court with repetition shall argue only those following.

Argument, pages 27 to 30.

## II.

The cases of *Pollock v. Farmer's Loan & Trust Co.* and *Hyde v. Continental Trust Co.*, 157 U. S., 429, and 158 U. S., 601, set at rest the questions involved therein.

We shall not, for reasons set forth in our argument, discuss preceding cases claimed to be inconsistent therewith.

Argument, pages 30 to 32.

## III.

The question of jurisdiction in the present case is controlled by the *Pollock* cases, and however grave as a matter of first impression, is no longer open.

*Corbus v. Alaska Treadwell Gold Mining Company*,  
187 U. S., 455, distinguished.

Argument, pages 32 to 34.

#### IV.

The *Pollock* cases decided (1) that taxes on the rents and income of real estate are direct taxes, and subject to the rule of apportionment; (2) that taxes on the income of personal property are direct taxes, subject to the same rule; and (3) that the Income Tax Law constituted one entire scheme of taxation and being invalid as to the income from real estate and personal property, was invalid as a whole.

The Corporation Tax—if it be an income tax—falls within the effect of each of these conclusions.

Argument, pages 34 to 42.

Under this point we urge:

(a) That in the case at bar the tax, if it be an income tax, falls on income of The Northern Trust Company from both real estate and invested personalty, including the bonds of municipal corporations.

Argument, pages 36, 37 and 41.

(b) That equally with the Income Tax Law of 1894 the Corporation Tax Law of 1909 is one entire scheme of taxation, and being so, must fail as a whole if it fails in essential parts. Citing:

*Pointdexter v. Greenhow*, 114 U. S., 270.

*Sprague v. Thomson*, 118 U. S., 90.

*Warren v. Charlestown*, 2 Gray, 84.

Argument, pages 37 to 42.

## V.

The Corporation Tax is an Income Tax, and being unapportioned is unconstitutional.

Despite the attempt of its framers by mere phraseology to negative the idea that it is an income tax, it remains so because of its essential character and substance.

*Stockard v. Morgan*, 185 U. S., 27.

*Asbell v. Kansas*, 209 U. S., 251.

*Galveston, Harrisburg and San Antonio  
Railway Co. et al. v. Texas*, 210 U. S., 217.

Argument, pages 41 to 48.

Under this we contend:

(a) That while a tax in certain cases may be laid on an intangible right or privilege in proportion to the value of some other property without being a tax on that property (as held in *R. R. Co. v. Collector*, 100 U. S., 595; *Home Insurance Co. v. New York*, 134 U. S., 594; *Plummer v. Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York v. Roberts*, 171 U. S., 658), this is only true (1) where the value of the property by which the tax is gauged is a reasonable measure of the value of the

intangible right or privilege, or (2) where the intangible right might be altogether taken away by the taxing government and may therefore be conceded only on such conditions as that government pleases.

(b) That neither of these conditions exists as to the Corporation Tax Law. It is not within the power of Congress to deny or concede to the corporations affected their right to exist or to do business, nor is the tax proportioned to business done by them or conditioned upon their doing business at all. It falls directly on their income from all sources.

(c) That the case of *Spreckels Sugar Refining Company v. McClain*, 192 U. S., 397, relied on to sustain the constitutionality of this tax as an excise tax is not in point. Its true effect is to the contrary.

## V I.

If the Corporation Tax should be held not to be an income tax but an indirect tax, it must be held to be a discriminating license or privilege tax, merely arbitrarily measured by the income of the persons selected for taxation. The question then recurs: For what privilege is the tax to be paid?

It cannot be the privilege of holding property, for that would make the tax identical with a tax on property and direct. It must, in the case of a corporation, be either the privilege of existing as a



corporation or of doing business as a corporation. While it makes little difference to our argument, we contend that it must be the privilege of existing as a corporation rather than doing business as a corporation for the tax is neither proportioned to nor conditioned on the doing of business. In the case of joint stock companies and insurance companies, the tax must be on the privilege of existing as such companies.

Argument, pages 49 to 61.

## VII.

Whether a tax on the privilege of being a corporation or of doing business as a corporation, the Corporation Tax is subject to the rule of "uniformity," which is *implicitly* required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax.

The Corporation Tax violates this implicitly required uniformity. Its selection of the persons to be taxed for the privilege of existence or of doing business is so "arbitrary and confiscatory" that it "transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Therefore this court should interfere.

*Knowlton v. Moore*, 178 U. S., 41.

The corporations created by the states are to the United States in the same relation as natural persons who are citizens of those states and cannot be arbitrarily selected for taxation on the privilege of existing or doing business.

*Louisville C. & C. R. Co. v. Letson*, 2 Howard, 497.

*Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

*Ohio & M. R. Co. v. Wheeler*, 1 Black, 286.

*Bank of Augusta v. Earle*, 13 Peters, 519.

*St. Louis v. Wiggins Ferry Co.*, 11 Wallace, 423.

*San Bernardino County v. Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

*Pembina C. S. M. & M. Co. v. Pennsylvania*, 125 U. S., 181.

*C. C. & A. R. Co. v. Meeky*, 142 U. S., 386.  
Argument, pages 61 to 67.

## VIII.

The Corporation Tax if not a direct tax is subject to the express requirement of "uniformity" in Section 8, Article 1, of the Constitution.

Even if the *expressly* required "uniformity" is merely a geographical uniformity between the states,

as held in *Knowlton v. Moore* (*supra*) and *Patton v. Brady*, 184 U. S., 608 (see, however, the concurring opinion of Mr. Justice Field, with whom three other members of the court agreed on this point in *Pollock v. Farmers Loan & Trust Company*, 157 U. S., 586), the Corporation Tax does not conform to it.

Argument, pages 68 to 76.

Under this point we contend that as the right or privilege of existing as a corporation or as a joint stock company or as an insurance company and the right or privilege of doing business as any one of them are very different things in one state from what they are in another, because of the differing laws of the states (for example, freedom of a corporation stockholder from individual liability exists in New Jersey but not in California), and as this court takes judicial notice on this appeal of the laws of all the states (*Hanley v. Donoghue*, 116 U. S., 1; *Fourth National Bank v. Francklyn*, 120 U. S., 747; *Case v. Kelly*, 133 U. S., 21; *Mills v. Green*, 159 U. S., 651), the Corporation Tax is within the judicial knowledge of the court unequal and wanting in uniformity between the states.

## I X.

The Corporation Tax is unconstitutional whether direct or indirect and whether uniform or not, because it is an attempted interference with the instrumentalities of the states.

*McCullough v. Maryland*, 4 Wheaton, 316.

*Collector v. Day*, 11 Wallace, 113.

*United States v. Baltimore & Ohio Railroad Co.*, 17 Wallace, 322.

*Railroad Co. v. Peniston*, 18 Wallace, 5.

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

*Ambrosini v. United States*, 187 U. S., 1.

Argument, pages 77 to 91.

Under this point we first contend:

(a) That the supposed power of Congress to impose this tax involves the power to destroy the power of the states to grant franchises or privileges of corporate capacity and the value and purpose of such franchises and privileges.

(b) That such power to grant acts of incorporation is practically unlimited in the states and incident to sovereignty.

*Briscoe v. The Bank of Kentucky*, 11 Peters, 257.

(c) That the tax is on the existence of a corporation and involves the right to destroy it.

(d) That while as held in *Knoulton v. Moore* Congress may tax, even though it involves the power to destroy, some business or property right of a citizen or corporation, it has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence.

*California v. Central Pacific Railroad Company*, 127 U. S., 1.

*Collector v. Day*, 11 Wallace, 113.

*Van Brocklin v. Tennessee*, 117 U. S., 151-178.

(e) That the cases of *Knoulton v. Moore* and *Veazie Bank v. Fenno*, 8 Wallace, 533, which we discuss, hold nothing to the contrary of our contention.

Argument, pages 80 to 86.

And, secondly, we contend under this point:

(a) That whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the state in the strictest sense and for that reason are given the power of eminent domain; that the functions of many of them are indeed governmental, *e g.*, the functions of water companies.

*Rogers Park Water Co. v. Fergus*, 180 U. S., 624.

*Freeport Water Company v. Freeport City*, 180 U. S., 587.

*Danville Water Company v. Danville City*, 180 U. S., 619.

(b) That the inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock* case.

Argument, pages 86 to 91.

## X.

Finally,—we contend that under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and that in its case therefore the Corporation Tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers;

Argument, pages 92 to 94.

And also,—that the income of municipal bonds to a very large amount is included in the income on which the Northern Trust Company threatens to pay one per centum as a tax, that such income from instrumentalities of state governments has been explicitly declared by this court untaxable by Congress directly or indirectly for any purpose whatever (*Pollock v. Trust Co.*, 157 U. S., at page 584 *et seq.*), and that this threatened action should be enjoined, independently of all other considerations.

Argument, pages 94 and 95.

## ARGUMENT.

(The dividing Roman numerals relate to the corresponding numbering in the preceding Brief or Abstract of the Argument.)

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## I.

The bill in this cause sets out clearly the grounds on which the constitutionality of the law involved is attacked. We submit that upon all and each of the grounds alleged it is invalid. There are several cases involving the constitutionality of this law, to be heard together. Many of these grounds are set forth with equal force by the other parties appellant, and from the ability and learning of the counsel who represent those parties, we know that these grounds will be argued by them in this hearing with great thoroughness. Therefore, without waiving any of the matters stated in our bill in this case or being willing to be understood to minimize in any degree the gravity and conclusiveness of the various constitutional objections to the law which our bill points out, we do not conceive it will aid the court to elaborate in detail in our brief and argument all or many of them and thus by duplication of citations and syllogisms place on the court an unnecessary and superfluous burden. This would be the less justifiable because the matter in-



volved—the limitations of the taxing power of Congress—although of such immense importance, is one with which the members of the court are necessarily as familiar as counsel, however diligent, conscientious and ardent, can have possibly made themselves.

It has been the subject of its most serious consideration many times since the institution of the Government. In nothing have the wisdom, the learning and the courage of this great tribunal been more signally exemplified than in its treatment of it.

All the authorities of importance which counsel can cite on the questions involved are the utterances of this court.

These utterances are of necessity familiar to it. They must be the more so because in all the later ones, made while a large portion of the personnel of the court was the same as now, the earlier ones were discussed and distinguished, and where need was, limited and modified.

The vigor of the dissent and the thoroughness and force with which the views of the minority of the court were set forth in some of the later cases, for example in those which must of necessity prove of greatest (and as we contend of controlling) importance in the discussion of the cases at bar, but add dignity, strength and conclusiveness to the equally

well considered conclusions of the majority who were unconvinced by them, and whose opinions voiced by the Chief Justice declared for this court and therefore for the country the construction which the constitution must bear as applied to the questions involved in those cases.

We allude, of course, to *Pollock v. Farmer's Loan & Trust Co.*, and *Hyde v. Continental Trust Co.*, argued together twice, and reported in 157 U. S., 429, and 158 U. S., 601, which we shall hereafter cite merely as the *Pollock* cases.

## II.

In view of the wealth of argument analytical and historical with which in the arguments of counsel on either side and in the various opinions of judges in the *Pollock* cases, the opinions of this court in *Hylton v. The United States*, 3 Dallas, 171; *The Pacific Insurance Company v. Soule*, 7 Wallace, 433; *Veazie Bank v. Fenno*, 8 Wallace, 533; *Scholey v. Rew*, 23 Wall., 331, and *Springer v. The United States*, 102 U. S., 586, were discussed, we shall not attempt to construe those cases or to comment on them save only as any one of them may seem to be relied on to establish some proposition unrelated to those which we believe were forever set at rest in the *Pollock* cases. They were of supereminent importance in the

discussion of those latter cases, and were so recognized by court and counsel alike, but the proper scope to be given them, the limitations to which they were to be held, and their varying degrees of authority were so settled in the *Pollock* cases, that we shall leave to others, if they will, to reopen a discussion on them. We shall treat as the fundamental and basic legal positions on which the constitutionality of the Corporation Tax Law is to be adjudged, the conclusions of the court embodied in the opinions of the majority in the *Pollock* cases. Behind them, to discuss the questions involved in those cases, and to distinguish preceding cases which have been claimed to be inconsistent with them we shall not go. The deluge may be taken for granted.

This was indeed the position taken by the framers and proponents of the law under discussion. It is a matter of common knowledge that it was passed as an alternative to an Income Tax, *co nomine*, on the incomes of persons natural or artificial. It was so passed because the decision of the *Pollock* cases stood like an impassable wall between the desires of those who wished such an unapportioned income tax, and its enforcement if passed. It was recognized that this tribunal would be unlikely to depart in less than two decades from judgments so thoroughly considered and so carefully weighed. Moreover,

it was then, and it is now, the natural conclusion of all thoughtful men, that it would injure the prestige of and even weaken the confidence of the people in all courts for this court to overrule a decision which upon such elaborate argument and elaborate consideration it had rendered against the constitutionality of an Act of Congress.

### III.

For the same reason we shall not linger over a discussion of the jurisdiction of the courts below and of this court over the cases at bar. We are entirely willing to concede the gravity of the question raised by the existence of the Act of 1867, which is Section 3224 of the Revised Statutes of the United States, providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." That question was thoroughly discussed in the dissenting opinion of Mr. Justice White in the first hearing of the *Pollock* cases. But we submit that it can not for a moment be supposed that the court will now, in these cases, recede from the position which Mr. Chief Justice Fuller so tersely stated in the opening paragraphs of the opinion of the court in that same hearing:

"The jurisdiction of a court of equity to prevent any threatened breach of trust in the mis-

application or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge v. Woolsey*, 18 Howard, 331; *Hawes v. Oakland*, 104 U. S., 450.

“As in *Dodge v. Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of and paying an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.”

This fully disposes for the cases at bar of the question of jurisdiction, however grave it might be and was considered as a question of first impression. The cases at bar are, so far as this matter is concerned, precisely similar to the *Pollock* case and the *Hyde* case, and we do not need to make the additional suggestion that in these cases, no more than in the *Pollock* cases, have the defendants or the Department of Justice, which represents them, raised below or insisted on here this objection, or that of an adequate remedy at law. “So far as it is within the power of the Government to do so,” undoubtedly the question of jurisdiction will be waived, for nothing can be more important than for the Treasury Department and its officers, and the Department of Justice and its officers to have from this court, before the payment of the tax becomes due, an authoritative statement on its widely contested validity. Without it, the litigation which will

flood the courts of the country by suits against collectors to whom money has been paid under protest or who are alleged to have made illegal exactions, will be overwhelming and intolerable.

*Corbus v. Alaska Treadwell Gold Mining Company*, 187 U. S., 455, was distinguished from the *Pollock* case, and the decision justifying the dismissal of the bill by the court below was not put on the applicability of the Statute of 1867, but on the absence of a demand by the complainant on the directors to protect the corporation against the alleged illegal tax. Had he shown an effort to do so, even, the court says, "a different case would have been presented."

In our cases, as in all the others before the court in this hearing, the allegations of an effort to secure the action of the directors of the several companies to protect the complainants are not only alleged but particularly set forth.

#### IV.

In pursuance of the plan indicated for our argument therefore, we address ourselves at once to that which in most important aspects is the one thing necessary to decide at the outset of the inquiry.

The law, before it passed the Senate of the United States, was most vigorously and exhaustively dis-

cussed. It was urged by many constitutional lawyers there, and is our position here, that it levies a direct tax on incomes. If it should be so held by this court, there is an end of the argument, for if the tax be an income tax, it is not the less obnoxious to the constitutional objection that it is an unapportioned direct tax, because instead of being levied on all persons natural and artificial, having an income above a certain figure, as was the Law of 1894 adjudged invalid in the *Pollock* cases, it is limited to corporations (that is, a particular kind of artificial persons constituted by the various states entities with the rights of natural persons resident within the state), together with associations of natural persons, not corporations, pursuing the particular business of insurance, or having a capital stock represented by shares.

And the *Pollock* cases decided that a general tax on incomes derived from "any source whatever" is a direct tax and can not be levied unless apportioned among the states in proportion to their populations.

It is true that before summing up its conclusions at the final hearing of the *Pollock* case, the court declared that it had considered the act only in respect of the tax on income derived from real estate and from invested personal property, and, as the opinion declares, had not "commented on so much

of it as bears on gains or profits from business privileges or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax, and been sustained as such."

But to the two conclusions which found: *First*, that taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes; and *Second*, that taxes on personal property or on the income of personal property are likewise direct taxes, the court added a *Third*: That as the tax in question, so far as it fell on the income of real estate and of personal property was a direct tax within the meaning of the Constitution and therefore unconstitutional and void because not apportioned according to representation; the entire law "*constituting one entire scheme of taxation*" was necessarily invalid.

Within the necessary effect of each of these conclusions falls the case which we are arguing.

In its application to a great multitude of corporations throughout the country, and especially and definitely in its application to the corporation involved in this case of *Smith v. The Northern Trust Company*, the Corporation Tax, if it be a tax on income, falls on income from both real estate and from invested personalty.



The bill to which the demurrer was sustained expressly sets forth that the Northern Trust Company may by law loan money on personal and real estate security; that it may execute trusts of every description; that in its trust capacity it is administering real and personal property of the aggregate value of many millions of dollars; that it derives an income from such sources, and that it holds in its own right real estate located in the City of Chicago of the value of more than one million dollars, from a part of which it receives income and rents of about nine thousand dollars per annum, and that it derives an income of more than fifty thousand dollars annually from its investments in interest-bearing bonds of cities, counties, public parks, and other municipal corporations, and that the Corporation Tax is a direct tax in respect of its real estate and personalty.

It has been suggested that even were the law to be held unconstitutional in its attempt to tax income from investments in real and personal property, it might be held valid as to all other, or some other income.

We submit that this position is untenable. As in the Income Tax Law of 1894, the provisions of the Corporation Tax Law of 1909 constitute one entire scheme of taxation. The taxation of income

arising from real estate and from invested personal property is in both laws a part of the warp and woof of that scheme. In neither case, it is apparent, would Congress have been willing to pass a law which should have exempted or taken no account of such income from real estate and personalty, while levying on, or measuring the tax by, the remaining income of all persons taxed in one case and of the selected persons taxed in the other.

The essential language which describes the income on which the tax is to be levied is nearly identical in the two acts. In that of 1894 the tax was expressly levied on

“the gains, profits and income received in the preceding calendar year by every citizen of the United States \* \* \* and every person residing therein, whether said gains, profits or income be derived from any kind of property, rents, interest, dividend or salaries, or from any profession, trade or employment or vocation \* \* \* or from any other source whatever.”

In that of 1909:

“Every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually a \* \* \* tax \* \* \* equivalent to one per centum upon the entire net income \* \* \* received by it from all sources during such year,” etc.

We fail to see any reason for holding as against

corporations, the law of 1909—if invalid so far as it affects the income from real estate and invested personalty—good in part and as affecting certain other kinds of income, which was not of equal force for holding as against all persons (corporations as well as others) the law of 1894, although invalid so far as it affected the income from real estate and invested personalty, good in part and as affecting such other kinds of income.

But this court, at the final hearing of the *Pollock* case, in cogent words rejected the argument in favor of such a holding as to the law of 1894, and in doing so cited and quoted with confirmatory approval the language of this court in *Pointdexter v. Greenhow*, 114 U. S., 270, and in *Sprague v. Thomson*, 118 U. S., 90, and the language of the Supreme Judicial Court of Massachusetts, by the mouth of Chief Justice Shaw, in *Warren v. Charlestown*, 2 Gray, 84. It would serve no useful purpose to repeat that language herein. The statement in each case is an enunciation of the established rule that courts cannot, in order to establish the partial validity and effect of a law, confer upon it a partial and discriminating operation which they cannot say the Legislature would have desired and provided for in the absence of the invalid portion of the law.

Can it be even doubtful that Congress would have declined to pass the Corporation Tax Law of 1909 had the income from the real estate and invested personalty of all corporations been by its provisions exempted from the income on which the tax was to be computed? It even refused to heed the recommendation of the President who suggested the exclusion of national banks, whose income is practically all from invested personalty.

It is perhaps not too much to say that the chief arguments used for the passage of the law gained all their force from the fact that corporations in the opinion of many of its supporters were absorbing an undue proportion of the resources of the country in their holdings of real estate and in their accumulation of immense amounts of invested personal property.

To hold the tax valid as to other income of corporations but not as to the income from these factors in corporate wealth would be actually to effect the exact opposite of that which Congress desired. It would be to tax corporations so far as they are active and useful business bodies and exempt them so far as they are rich, idle, and grasping.

And yet if it be only doubtful even, whether Congress would have passed the law emasculated in the manner suggested, this court must, if it ad-

judges it invalid as to the income from real estate and invested personal property, declare it invalid altogether, for, in the language of Mr. Justice Mathews in *Pointdexter v. Greenhow*;

“To hold otherwise would be to substitute for the law intended by the Legislature one they *may* never have been willing to enact.”

Before we proceed to a discussion of what the Corporation Tax is levied on, and what is its proper designation, we call attention to the fact that in the case of the defendant corporation, the bill alleges that an income of over fifty thousand dollars is derived by the Northern Trust Company annually from municipal bonds, bonds the income of which the unanimous opinion of the court in the *Pollock* cases (as distinguished from its holding on all other contentions), decided could not be taxed by the Federal Government because such bonds were the instrumentalities of the state. We shall return to this consideration later and in another connection, but we stop to allude to it here to ask further, whether it can be conceived to have been even the intention of Congress to tax the incomes of all the corporations of the country, save and except that derived by its trust companies and banks and other financial corporations from municipal bonds. Setting aside the matters on which the court was divided in the *Pollock* case—the validity of the un-

apportioned federal taxation on the income of real estate and personalty—we have, if this Corporation Tax be a tax on incomes, in the attempted taxation of the income of state and municipal bonds a factor and component part of “one entire scheme of taxation,” which factor and part an undivided court in the *Pollock* case found impossible and invalid.

## V.

Thus we are brought in this main branch of our argument directly to the question: Is this Corporation Tax an income tax?

It is true the act imposing it does not so denominate it. Indeed, it is conceded at the outset that in its mere phraseology (but in its phraseology only) the first care of its framers and proponents was to negative the idea that the tax enacted was to be an income tax.

It was to be “a special excise tax”—if calling it so could make it so. It was not to be “one per centum upon the entire net income, etc.” It was to be “equivalent to one per centum upon the entire net income, etc.” It was not even to be a tax “on the carrying on or doing business by such corporation, etc.,” but a tax “*with respect to* the carrying or doing business, etc.”

The adoption of this last language from the opin-

ion of Mr. Justice Harlan in the *Spreckels* case (*Spreckels Sugar Refining Company v. McClain*, 192 U. S., 397, where it was entirely in place, to use it in a legislative act where it was emphatically out of place (for it is juridical, not legislative, phrasing), accentuates the foreboding of the authors of the law that it could not readily pass the tests to be applied by this tribunal. To secure this end they called the tax that which it was not—"an excise tax"—they resorted to what, with all respect, he it said, seems to us the trivial expedient of using the words "equivalent to," instead of the word "of"; and they used juridical in place of apt legislative language in the hope that by the use of these words alone they could, as it has been expressed, "attach this tax to the business rather than to permit it to be attached to the property."

We submit that the authors of the law, able and ingenious as they were, were attempting an impossibility. This court would not exercise the high prerogative of finding a tax levied by the Congress of the United States unconstitutional and void if phrased in one set of words, but, although exactly the same in substance and result, constitutional and valid if phrased in another. Such refinements and technicalities are not practices of great tribunals, least of all of this one. The Income Tax of 1894, ad-

judged void in the *Pollock* cases, would not have been held valid had it run, "There shall be assessed, levied, collected and paid annually, with respect to the carrying on of the business of receiving income, gains and profits, by every citizen of the United States, whether said gains, profits or income be derived from any kind of property, etc., \* \* \* or from any other source whatever, a tax equivalent to two per centum on the amount so derived, etc." Not such are the methods of this court, which looks through all legal fictions and pretenses straight to the heart of the matter involved.

It will have no sympathy with an astuteness which plays fast and loose with language in legislation in the hope that by using one phrase a purpose can be accomplished constitutionally, which comes into collision with the Constitution, if another in substance and real effect identical, is used.

Citation of authority is not needed for so plain and patent a truth, but express authority of this court is not wanting to this very proposition.

In *Galveston, Harrisburg and San Antonio Railway Company et al. v. Texas*, 210 U. S., 217, in holding that the State of Texas could not impose a certain tax upon railway companies equal to one per centum of their gross receipts, Mr. Justice Holmes, in the opinion of the court, says:



"Neither the state courts nor the Legislatures" (and the same rule must apply to Congress) "by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

And again:

"This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

And he cites, in support of his language,

*Stockard v. Morgan*, 185 U. S., 27, and

*Asbell v. Kansas*, 209 U. S., 251.

Passing from mere phraseology to real substance, what is the Corporation Tax levied on? If not on incomes, on what does it fall? It has certainly all the *indicia* of an income tax.

As has been well said by another (Machen on The Federal Corporation Tax), *prima facie*, a tax is laid upon that in proportion to which its amount is measured; and where a tax may be laid on an intangible right or privilege, in proportion to the value of some other property, without being a tax on that property (as it is conceded that this court has held it may in some cases be: *Railroad Company v. Collector*, 100 U. S., 595; *Home Insurance Co. v. New*

*York*, 134 U. S., 594; *Plummer v. Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York v. Roberts*, 171 U. S., 658), it is because the value of the property by which the tax is gauged is a reasonable measure of the value of the intangible right or privilege, or where the intangible right might be altogether taken away by the taxing government and may therefore be conceded on such conditions as that government pleases.

Neither of these conditions exist as to the law under discussion.

It cannot, we submit, properly be held or considered to be a license or privilege tax on the right to be or to do business as a corporation, for it is not within the power of Congress to deny or concede such powers to a corporation like the defendant corporation here (and like the great majority of those corporations which this tax affects), or to prescribe the conditions on which they may be exercised within the state creating it. We shall have occasion to discuss this proposition in another aspect in a subsequent branch of our argument, but we state it here, as a reason for its being impossible to hold this tax anything but an income tax on the ground that it is merely proportioned or measured by the income.

Nor despite the peculiar phraseology which calls

it a tax "with respect to the carrying on or doing business," can it be considered a tax on doing business at all. It is not proportioned to the amount of business done by the corporation or other association or company taxed, nor to the amount of income received from any such business, but to "the net income over and above five thousand dollars received by it *from all sources* during such year, exclusive of amounts received as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed." In the case of companies organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska, it is imposed on them whether they do any business or not. The net income which these companies derive may be entirely from real estate, or entirely from invested personalty, it may indeed be from the municipal bonds which, and the income from which, this court has unanimously declared Congress cannot tax. The companies may be doing no business—but be merely "incorporated gentlemen of leisure" (Vann, J., in *People v. Roberts*, 154 N. Y., 1), or they may be doing business at a loss, more than made up by their income from real estate or invested personalty before accumulated. But in

each case this tax of one per centum falls with the same force and directness on their income over five thousand dollars.

What is this but an income tax? And how does the expedient of calling it "A Special Excise Tax" alter or conceal its true character? And is it any less obnoxious to the objections to its constitutionality because it is levied on some citizens and persons (artificial and natural) over whom and whose business Congress has no visitatorial or regulatory power, rather than on *all* the citizens of the country, as was the Income Tax of 1894?

Unless these questions can be answered satisfactorily—in a sense different from that which seems to us the obvious one—this tax must fall as within the construction of the Constitution laid down in the *Pollock* case.

The case of *Spreckels Sugar Refining Company v. McClain*, 192 U. S., 397, is especially relied on as an authority which will sustain this tax as an "Excise" tax and negative the proposition that it is an "Income" tax. We cannot so consider it. Its effect seems to us the opposite. The tax involved in the *Spreckels* case was imposed on the gross receipts in their business of *all* persons carrying on either of two specified occupations. It was therefore certainly an "Excise Tax." The court expressly held that

the tax being an excise tax on the particular occupations named, no part of the gross receipts made the measure of the excise not having a necessary connection with those occupations could be considered in fixing the amount of the tax, and reversed and remanded the case because they had been so considered.

The tax involved in the cases at bar, does not purport to be measured by the receipts in any particular business or in business at all. It is, like the Income Tax of 1894, measured by an income from "all sources." It does not fall on all persons engaged in any particular occupation or occupations. It falls on one peculiar kind of persons by virtue merely of their existence and their having an income, as the Income Tax of 1894 did on all citizens by virtue of their existence and income. It is neither in spirit nor letter within any holding in the *Spreckels* case.

## VI.

To the conclusion that the Corporation Tax Law provides for an Income Tax and must therefore stand or fall by that description, our own opinion is that there is no admissible contradictory or alternative proposition.

As a tax on the income from real estate and in-

vested personal property owned by the corporations and the other associations subject to the tax, it cannot, because unapportioned, be sustained by this court, unless the court is prepared to depart from its decision in the *Pollock* cases. Of that possibility we shall take no further account, for nothing that we could say would render less remote the contingency nor add force to the arguments for adherence to it which are already in the minds of the court.

Whether or not the Government will concede that if the Corporation Tax is an Income Tax it falls within the ruling of the *Pollock* cases, we do not know.

Whether or not, if such a concession be made, it would ask the court to recede from anything laid down in the *Pollock* cases, we do not know.

We do know, however, that the Government does not concede that the Corporation Tax is in any sense an Income Tax, but holds fast to the theory that it is, as it terms itself, "A Special Excise Tax." We pass then as in pointing out in our bill the constitutional objections to the law we did, from our own view of its real nature to that taken by the Government, shifting the battle ground only that we may meet the defenders of the law on their own chosen field and with their own weapons.

In the further discussion of the questions involved, for the sake of the argument, and for the sake of the argument only, we shall eliminate from consideration the thesis of the truth of which we are really convinced, that the Corporation Tax is an Income Tax, and therefore a direct tax, and adopt the other, which we have indicated, we believe inadmissible; that it is, if not as it calls itself, "A Special Excise Tax," at least an indirect tax.

We do not care in this branch of the argument more than in the preceding one to haggle over the mere meaning and use of words. Therefore, we shall enter on no discussion of whether admitting this tax to be indirect and not an Income Tax, it is properly termed an "Excise Tax." We think it might be easy to show from the definitions of the word "Excise" as applied to governmental impositions, by legal and general lexicographers alike, from the famous unjustifiably prejudiced exposition of Dr. Johnson, to the present time, that the strictly proper use of the term "Excise" makes it refer only to a tax on commodities or on particular occupations, which this tax certainly is not.

But we do not see any good end to be attained by such a showing. Our faith is strong, as before indicated, that it will not be by names legislatively given, but by things legislatively done, that this

court will be governed in the disposition of these cases.

If Congress did not attempt to levy a direct income tax, it did attempt to levy an indirect privilege, license or franchise tax. By whatever name it may be called it falls within the class of indirect taxes which the Constitutional Convention in its finished work, lumped together as "duties, imposts, and excises."

We do not think it is necessary or useful in view of the language of the majority opinion of the court at the first hearing of the *Pollock* cases, 157 U. S., at page 557, and never withdrawn, to enter upon any discussion of whether there can be any tax levied by Congress which is not a direct tax nor included under the words "duties, imposts and excises."

The Chief Justice in that opinion, said:

"Thus in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

"The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of Section eight to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

"And this view was expressed by Mr. Chief



Justice Chase in *The License Tax Cases*, 5 Wallace, 462-471, when he said: 'It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited and thus only it reaches every subject and may be exercised at discretion.'

"And although there may have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We may then in this branch of the argument build on the foundation that if the tax in question be not "a direct tax," it falls, if not within the strict definition of an "excise," yet within the terms generically used by the Constitution makers, "duties, imposts and excises," and is subject to the rule of uniformity.

But the essential question which then meets us again is not what is the proper name of this tax—which must be "uniform"—but On what is it levied? or For what is it to be paid?

Answers to these questions are necessary before we can properly discuss the question lying beyond: Has the rule of uniformity been followed in its imposition? And the one still farther on: If the rule

of uniformity has been thus observed, is the tax invalid because levied on and exacted for something which causes it to infringe on the rights reserved to the States under the Federal Constitution?

The questions "On what is it levied?" or "For what is it to be paid?" are, however, really identical on that hypothesis on which we are proceeding which eliminates the conception difficult to banish from the mind—that as this tax is directly proportioned to the income of the persons taxed it falls on that income.

But if we are to succeed in thus banishing this conception, we must do it by first, with whatever effort is necessary, accepting the proposition of the Government, as it has always been that of all the advocates and defenders of the tax, that the net income of the respective parties taxed has nothing to do with the matter, except as a *measure* for the amount of a discriminating *license or franchise* tax to be placed on them.

This was the position, it may be noted, taken in the ablest though not the longest arguments made in favor of the validity of the law in the Senate of the United States. Senator Daniel baldly stated the theory which we have indicated,—the only other theory which can be invoked with plausibility even, to withdraw this tax from the category of direct in-

come taxes. In opposing the practical exemption of holding corporations, which by the provision concerning deductions finally secured a place in the bill, he said, "An impression \* \* \* that it is taxing property twice if a corporation holds stock in another corporation if both corporations are taxed with respect to the holding of such property \* \* \* is a complete confusion of thought. If a holding corporation owns bonds or stocks, it does not by this proposition pay any tax on them at all as bonds or stocks. They are simply used as a yardstick by which the measure of the excise, which is in the nature of a license tax, shall fix the number of dollars for that license or privilege." Senator Root said: "It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility which is taxed."

It does not, we will admit, look very logical that Congress should nevertheless have allowed the deduction of the income from all corporation stocks owned by a holding company, from the "yardstick measure," but we must remember not only that logic is not always a distinguishing mark of legislative bodies, but also that we are now excluding only by hypothesis, the view that Congress, despite the theory of the framers and chief advocates of the law that phraseology could hide substance, intended to

pass another direct income tax law to enable this court to reconsider its conclusions in the *Pollock* cases.

Much more logical viewed in the light of its own theory is the ruling of the Department of Justice, despite its apparent injustice in effect, that the various issues of the bonds of the United States exempted from taxation by the laws which issued them, must yet be computed as within the sources of that income which is to be the "yardstick," with which to measure the "license," "franchise" or "excise" tax which the Corporation Tax is alleged to be.

But still, when the idea that the income, of which an aliquot percentage is to be taken in the license tax, is a mere measure is fully assimilated, the question recurs: For what privilege is this license tax to be taken?

As we are eliminating by hypothesis the possibility of this tax being one on property or income we must eliminate also the idea that it is a tax on the privilege of holding property. Certainly no one would attempt to make a distinction in nature between a tax on property and a tax on the privilege of holding property, or a distinction between a tax on income and a tax on the privilege of receiving income. To do so would be to contend that to make an

unapportioned Federal tax on real estate, on invested personal property or on municipal bonds valid, it is only necessary for Congress so to change the phraseology as to declare it a tax on the privilege of owning real estate, of owning invested personal property or of owning municipal bonds. This would be a *reductio ad absurdum*, not necessary to comment on.

In view then of the hypotheses eliminated, there are but two answers to the question, "For what privilege is this license tax to be taken?" possible to formulate. One is that it is for the privilege of doing business, not any especial or particular kind of business, but any business whatever. This of course implies further that selected apparently arbitrarily from all other persons and bodies whatever, corporations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies, shall alone be required to pay a license tax for the privilege of doing business, while all other persons and associations may do the same business without such an imposition.

The other possible answer is that this license tax is to be paid in the case of a corporation for the privilege of being a corporation and in the case of any of the other associations or companies men-

fore, on the privilege of *being* a corporation that the tax is laid, if it be a privilege or license tax.

It may be said—indeed, it has been said (Machen on Corporation Tax)—that the tax cannot be on the privilege of existing as a corporation, because it is applicable not only to corporations but to various unincorporated bodies.

The obvious answer to this is, that if it is a privilege tax at all, it is a privilege or license tax laid on different privileges. So far as corporations are concerned, it is laid on the privilege of being a corporation, and undoubtedly it was principally for the purpose of affecting corporations that the law was passed. But Congress added to that privilege to be taxed, the privilege of being a joint stock company organized for profit and having a capital stock represented by shares, the privilege of being an association organized for profit and having a capital stock represented by shares, and the privilege of being an insurance company. It is true that this was a somewhat heterogeneous collection, but we have before noted that the logical working out of the original idea of the tax seems to have been defective. It does not prevent the tax on a corporation from being a tax on the privilege of being a corporation, because the tax on a joint stock company is a tax on the privilege of being a joint stock company. Indeed, as we shall

hereafter point out more in detail, the privilege of being a joint stock company of the kind described in the law does not in some states differ more from the privilege of being a corporation than the privilege of being a corporation in one state differs from the privilege of being a corporation in another.

We shall assume, therefore, in the mere phrasing of our further argument, that the only plausible alternative to the holding that the Corporation Tax is a direct income tax on certain selected persons, is that in the case of a corporation it is "a privilege or license tax" on the right to be a corporation. We do this because it seems to us true, not from the necessity of the argument, for all that we shall suggest will apply, in substance, as well, if the tax is on the privilege of doing business as a corporation, as though it were on the privilege of existing as a corporation. Indeed, does not the franchise or charter granted by a state to exist as a corporation imply a right to do business?

## VII.

Consider, then, first, on whom this privilege tax principally falls:

Corporations like the one involved in this case are creatures of the state under whose laws they are incorporated. They are artificial persons regulated

within that state, it is true, by the laws of the state which created them and which may impose such conditions on their existence as it pleases. So, too, may other states impose conditions on the exercise of their functions—practically on their existence—in such states. But to the Federal Government they are in the same relation as natural persons having the same rights of citizenship in the creating state. The United States has no regulatory or visitatorial powers over them which it does not have over all persons in its jurisdiction. And the same thing is true of insurance companies and joint stock or other associations of the nature described in the law.

Were authorities necessary for this proposition we could cite them in scores from the decisions of this court. We content ourselves with mentioning only:

*Louisville C. & C. R. Co. v. Letson*, 2 Howard, 497.

*Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

*Ohio & M. R. Co. v. Wheeler*, 1 Black, 286.

*Bank of Augusta v. Earle*, 13 Peters, 519.

*St. Louis v. Wiggins Ferry Co.*, 11 Wallace, 423.

*San Bernardino County v. Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

*Pembina C. L. M. & M. Co. v. Pennsylvania*, 125 U. S., 181.

*C. C. & A. R. Co. v. Mackey*, 142 U. S., 386.



Unless, then, the defenders of this tax are, as has been well said, prepared to go to the extent of asserting that Congress can levy at its discretion a tax upon all red headed men, or all blue eyed men, or both, under the guise of a privilege or license tax for being thus red headed or blue eyed; or, at the very, least, can levy a tax on the privilege of such red headed or blue eyed men to do business in the United States, while leaving untouched by such taxation all other men doing the same business, this law must fail on their own theory.

And so some at least of its advocates have conceded and boldly avowed their belief in the hypothetical proposition. They have done this, acknowledging that such a tax would not be uniform between citizens throughout the United States nor between persons in the same states; admitting, too, that it would be an arbitrary classification of persons to be taxed, not justified ethically, as they contend this Corporation Tax is, but nevertheless constitutional and beyond the power of this court to interfere with or to declare invalid. The ground of this contention is that the unconstitutionality of a tax can not be declared unless it is shown that it infringes on the express words of the Constitution limiting the otherwise uncontrolled right of Congress to tax.

The uniformity required in the levying of indirect

taxes, they say, is a geographical, not an inherent, uniformity and means only that the tax must be operative in all the states alike.

We shall briefly allude to this question of the nature of the expressly required uniformity in another connection, but for the purposes of the argument at this point, we admit that such has been the decision of this court as to the meaning of the express limitation of uniformity "throughout the United States" imposed upon indirect taxes by the Constitution.

But we are unprepared to admit the further necessary premise of the argument of the defenders of the tax that the unconstitutionality of a tax must absolutely be found in the express words of the Constitution.

We have alleged in our bill, as before noted, a conclusion of law that uniformity is, if not expressly, yet "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax," and for that proposition we strenuously contend. On it we are certainly not foreclosed by any utterance of this court, which, in the case most strongly insisted on as establishing forever and beyond all controversy that

the express uniformity required by the Constitution is only a geographical one (*Knowlton v. Moore*, 178 U. S., 41), said:

"It may be doubted by some, aside from express constitutional restrictions whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, *would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.* On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since as we understand the law, we are clearly of the opinion that it does not sustain the construction which was placed on it by the court below."

Again:

"If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."

We contend that the time spoken of by Mr. Justice White has now come; that the tax under discussion is "arbitrary and confiscatory," and that in-

herent and fundamental principles for the protection of the individual should be applied.

It is not the exercise of an allowed legislative discretion raising merely a question of abstract justice and expediency that selects from some millions of persons engaged in myriads of differing mercantile, manufacturing, agricultural, fishing, mining, financial and other industries, several hundred thousand only, whether because of their blue eyes or red hair or because they are in the purview of the state which created them alone, artificial rather than natural persons, and subjects them to a privilege or license tax either for the right of existing or for the right of carrying on their various and varied occupations.

It is so much a matter of common knowledge that it is not out of place in this argument to allude to it, that there are 400,000 corporations in this country and that not one per cent, with the exception of the railroads, are doing a business more public with reference to the interests of the United States than the millions of men in and out of partnerships, engaged in the purely private business activities of the country. The trade or business that the majority of these corporations carry on reaches down to the local mercantile business of small cities and towns where they are competing perhaps with

powerful individual or partnership rivals, at whose mercy these corporations who have themselves no counter-balancing advantages against such rivals, will be by the operation of this law placed, if it should be held valid.

We do not urge these considerations with any reserved thought that they can affect the judges of this court if it is to be held that they are matters merely of expediency and exact justice, to be therefore properly addressed to Congress alone; but because we believe them to be proof of such gross discrimination and arbitrary exercise of power in taxation as in the striking language of Mr. Justice White for this court, "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We shall not press the argument on this point further. It is of a nature that will appeal to this court at once and spontaneously or not at all. If we are wrong in our conception of the power of this court or of the exceptionally arbitrary discriminations of this tax, the court will not be moved by our insistence; if we are right, the court will recognize it and prevent by the exercise of its highest prerogative and duty a great injustice to the citizens who have associated themselves together in corporations and joint stock companies.

## VIII.

We come now to the express uniformity "throughout the United States" required by the Constitution in duties, imposts and excises.

In our bill (of which there is an abstract in the statement prefixed to this argument), we have in Paragraph fifteen under alphabetical arrangement set forth certain particulars as we conceive them, in which this tax does not conform to the rule of uniformity. As to those which are listed under subparagraphs A, B, C, D, E, F, and H, we will concede that they lose much of that part of their force which rests upon the *express* uniformity required by Section 8 of Article 1, of the Constitution, if that uniformity is not an inherent but a mere geographical uniformity. That it is a mere geographical uniformity we must also concede was held in *Knowlton v. Moore, supra*, and in *Patton v. Brady*, 184 U. S., 608.

On that proposition therefore we shall only presume to say that in the *Pollock* cases, in which the tax under discussion bears much more resemblance to the Corporation Tax than those discussed in *Knowlton v. Moore* and *Patton v. Brady*, four members of this court, as shown by the opinion on the first hearing, held that the tax violated the uniformity required, and Mr. Justice Field's concurring

opinion declared that "the correct meaning of the provisions requiring duties, imposts and excises to be uniform throughout the United States" is that the law imposing them should have an equal and uniform application in every part of the Union, and that "if there were any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt should be resolved in the interest of justice in favor of the taxpayers."

And because of the exemptions which were little different in principle in the Income Tax Law of 1894 from those provided for in the Corporation Tax Law of 1909, he announced his conclusion that the part of the Income Tax Law which levied duties, imposts and excises was void in not providing for the uniformity required by the Constitution in such cases. As we have said three other justices of the eight then sitting agreed with him in that conclusion and in consequence the precise question (which became an academic one in the subsequent hearing of the case) was not decided at either hearing.

But in each of the sub-paragraphs of our bill referred to are allegations concerning the provisions of the law which no holding of this court has deprived of whatever force they may have to the

minds of its members in connection with the considerations we have already urged against the power of Congress under the *implicit* requirements of our Constitution and system of government, to make arbitrary, unreasonable and grossly discriminating classifications in the levying of taxes.

But farther;—on the strictest construction of the constitutional limitation to uniformity in excise and other indirect taxes we contend that we have pointed out in sub-paragraph G of Section 15 of our bill matters which show that this Corporation Tax does not conform to it. The tax is no more uniform geographically between the states than inherently between individuals, partnerships and corporations within the respective states.

The tax, so far as a corporation is affected, is one on the right or privilege of existing as a corporation; so far as a joint stock company is concerned, of existing as a joint stock company; so far as an insurance company is concerned, of existing as an insurance company;—or at the very best that can be said of it on the right or privilege to do business as a corporation, a joint stock company or an insurance company respectively.

But the right or privilege of existing as a corporation or as a joint stock company or as an in-



surance company and the right or privilege of doing business as any one of them, differs widely in its nature among the different states. These rights and privileges are very different things in New Jersey, for example, from what they are in California.

For illustration: In the executive message which first proposed a corporation tax to the Senate and in much of the discussion in that body it was assumed that the privilege of existing or doing business as an artificial entity included a right of freedom from individual liability by those who owned stock. So it does in New Jersey for example in the case of most corporations at least. But no such freedom from liability is connected with the right or privilege of being or doing business as a corporation in California, where by the constitution of the state, each stockholder of a corporation is made individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. (Constitution of California, Article XII, Sec. 3.) It is not only alleged in our bill—it is within the judicial knowledge of the court (for the Supreme Court on appeals from the federal court takes judicial notice of the laws of all the states—(*Hanley*

v. *Donoghue*, 116 U. S., 1; *New York Fourth National Bank v. Francklyn*, 120 U. S., 747; *Case v. Kelly*, 133 U. S., 21; *Mills v. Green*, 159 U. S., 651), that the rights, duties and privileges and obligations of corporate existence differ so widely in different states that this Corporation Tax is the taxation in different states of entirely different things by accident more than design having the same name. The word "Corporation" has no more the same meaning in California than it has in New Jersey than it has in England, where it is understood to mean a municipal governing body.

What is this but a want of geographical uniformity? Words can hardly make it plainer.

The same propositions are emphatically true of insurance companies and of joint stock companies in the various states. They are created, supervised and regulated by and under entirely different laws in different states. The right or privilege therefore of being a joint stock company and the right or privilege to do business as a joint stock company is an entirely different right or privilege in one state from that which it is in another.

In some states joint stock companies are not, we think, provided for by statute at all. In such states, what is a joint stock com-

pany? In the federal law the term certainly has no specific meaning. Is there a common law definition of it? If so, it is, in those states, the right or privilege of being such a joint stock company as has a common law organization that has to be paid for by this tax: But in other states it is, by statute, necessary to the legal existence of a joint stock company that certain documents be filed in a public office. Failure to file them leaves the company a mere partnership. In other states the same form of organization constitutes a joint stock company without any filing of papers. Thus, identical organizations would constitute in one state joint stock companies subject to the tax and in another state mere partnerships not taxed. Again, where is the geographical uniformity? It is violated in as plain and obvious a manner as the framers of the Constitution could ever have feared it might be when establishing the limitation.

It will not do to say that such organizations as by the force of statute law are left partnerships because of failure to comply with filing requirements, will fall within the description of "associations organized for profit and having a capital stock represented by shares," for the "shares" will be shares in a partnership in no wise differing from those duplicate originals of a partnership agreement which define

and specify the respective interests of the partners in the common fund or capital of the partnership, and we have not heard any claim and do not believe that such a one will be made that the intent of Congress covers partnerships, although the law does not expressly qualify the term "shares" with a limitation that they must be transferable.

And to illustrate the general obscurity of the law, we may ask what sort of an "association" or combination of people "organized for profit and having a capital stock" can there be which is not a corporation, a joint stock company or a partnership?

The laws which regulate the business and duties and rights and very existence of insurance companies, of banks and trust companies (like the Northern Trust Company), and of their stockholders, vary so much in the different states that it would take a volume to enumerate the differences. Does the tax on the right or privilege of being an insurance company, or bank, or trust company, or of doing business as an insurance company, bank, or trust company, fall on the *same* right or privilege in these different states? Is there uniformity in such a tax "throughout the United States," even if we give those words the strictest geographical meaning? These questions admit to our minds only of a nega-

tive answer. If that be the true answer, this tax must fall, even if it be truly an "excise" tax and "indirect."

Before we leave this subject of geographical uniformity we wish to allude to some alleged significant decisions of this tribunal which have not been officially reported and the statement of which, therefore, as made by an eminent Senator and constitutional lawyer, we have had no means of verifying prior to the printing of this argument. We use the matter, therefore, in no sense as authority, but only as illustration.

The Senator had made the extreme declaration to which we have before alluded and which we dispute, that Congress could validly tax all red headed men engaged in a given line of business, if the tax fell upon every red headed man in Massachusetts as well as in Mississippi and in Texas and in all other states.

He was asked:

"Can the general Government tax the cotton of the south and leave the wheat of the western farmer untaxed?"

To which he replied:

"Congress did once levy a cotton tax and it was attacked in the courts. The trial Judge held the law constitutional and the case was appealed to the Supreme Court of the United States which then consisted, I believe, of only eight members, there being a vacancy, as I re-

call, in the Chief Justiceship. The question was argued and re-argued and probably argued a third time in that tribunal. The judgment below was affirmed without any opinion by a divided court, four of the Judges holding the law unconstitutional and four holding it constitutional. The four who held it unconstitutional did so, as I have always understood, upon the ground that the court must know judicially that cotton could not be grown in all the states and therefore that the tax on it could not be uniform. I have always regretted that the opinions in that case have never been published. The Senator's inquiry suggests a very pertinent consideration. *I do not myself believe that Congress has the power to levy a tax which the court can judicially know is incapable of uniform operation.* I do not hesitate to say that if that cotton tax had been levied at any time except in a period of great exasperation and sectional prejudice the court would have unanimously held it void. I must not forget to pay Congress the compliment to say that after the argument of that case, Congress had the good sense to repeal the Cotton Tax Law. That is the reason it was never finally and judicially tried out to a conclusion."

We agree with the learned and distinguished lawyer, whose words these are, that Congress has no power to levy a tax which this court can judicially know is incapable of uniform application. Such a tax is the one under discussion. The court not only can, but must, judicially know, if this tax be an excise tax on privileges or rights, that inasmuch as it falls on rights and privileges radically and inherently different in the different states, it is incapable of even geographically uniform application.

## IX.

We pass now to another branch of our argument.

It is upon the objection to the tax specifically set forth in the sixteenth paragraph of our bill that if it be an excise tax—a franchise privilege tax—whether or not it be held uniform throughout the United States within the meaning and intent of the Constitution, it is in conflict with the Constitution of the United States because the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of such franchises and privileges which the states have full power to grant,—and because the tax is, both generally in its effect upon all the states and particularly in its effect on the defendant corporation and others like it, an attempted unconstitutional interference with instrumentalities of the states.

This objection to the law is one which we should deem, even in the absence of all others, controlling and decisive, and it is from no want of a sense of its importance and weight that we shall content ourselves here with a very concise and unelaborated

argument to sustain it in its widest and most fundamental aspect. But we know that it will receive from other counsel before the court the comprehensive and detailed discussion which it deserves, and we do not desire to duplicate and repeat unnecessarily matters which are thus sure to be fully and exhaustively treated by others.

The objection reduced to its lowest terms may be said to be this:

The power to tax involves the power to destroy, as the often repeated utterance of Chief Justice Marshall in *McCulloch v. Maryland* asserted. The power of creating corporations is a reserved right of the states. It is practically unlimited in the states. As this court said in *Briscoe v. The Bank of Kentucky*, 11 Peters, 257, p. 317:

“A state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty.”

But if Congress, by taxing, can destroy the right or privilege of being a corporation, it infringes on the power of the state to create corporations.

And here, for the first time in our argument, we think that the question we have before discussed, whether this Corporation Tax is placed on the privilege of being or existing as a corporation or on



the privilege of doing business as a corporation, becomes, although not vital, of some importance.

For it has been urged by others and may be urged by the Attorney General here that a doubt might exist whether a federal tax could be laid upon the charter of a corporation granted by a state, which tax must be paid *before* that corporation could go into existence, but that such doubt does not exist about the tax under discussion because it is a tax levied upon the *business* of such a corporation *after* it goes into operation and is to be collected under penalty, and not by the forfeiture of its charter.

In view of the consideration that if the tax is placed on the privilege of doing any business as a corporation, it is placed on the privilege which is in the last analysis all that the charter is granted for and means, the distinction seems to us to be too fine to be vital even in this phase of the argument; but even more clearly does the fact that the tax is not made a condition precedent to the mere granting of the charter or incorporation right appear immaterial, if this tax is one not on the privilege or right of *doing business* as a corporation, but upon the very right or privilege of *being* a corporation. That this is the true nature of the tax, considerations which we have hereinbefore mentioned force us to believe. And this view is further strength-

ened by the fact that those attributes of corporations which it is claimed render them, rather than natural persons, proper objects of this discriminating tax, privileges which it is said should be paid for, namely, persistence in existence and exemption of stockholders from individual liability (which latter privilege, however, as we have before remarked, does not always exist) are inherent characteristics of the franchises granted by the state, elements in the very existence of the corporations, and no part of the business which they conduct.

If the tax is thus on the very existence of a corporation and the right to tax involves the right to destroy, it can make no difference as to its constitutionality whether it is placed on the right of the state to grant the franchise or on the franchise when granted, nor whether its payment is a "condition precedent" or a "condition subsequent."

We are well aware that an argument from the famous and somewhat epigrammatic utterance of Chief Justice Marshall, which has been quoted, may easily be pressed too far. The force of the reasoning on this point of Mr. Justice White in his opinion in *Knowlton v. Moore* (*supra*), and of other members of the court in the cases that he therein cites, can be denied by no reasonable man. "If a lawful tax can be defeated," he says, "because the power which

is manifested by its imposition, may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied. Under our constitutional system both the national and the state governments moving in their respective orbits have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

And so, applying this thesis to a tax *not* "on the right to regulate the devolution of property on death," but "on the transmission or receipt" to and by the heir or devisee, the opinion rejects the argument against such a tax that "wherever a right is subject to exclusive regulation by either the Government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate," declaring rightly that such an argument might be applied to the right to receive conveyances, mortgages, leases, pledges and indeed to the right to all property and the contracts which arise from its ownership (since they, too, are subject to state

regulation exclusive in its nature), as well as to the right to inherit, or receive by legacy, and thus the authority of the National Government to tax almost every subject of direct and many acknowledged objects of indirect taxation would be excluded.

And in accordance with the analogous doctrine that the power residing in a state to regulate (or, indeed, prohibit) a given business, does not make unconstitutional an act of Congress imposing a tax on carrying it on, the License Tax cases (5 Wallace, 462), were decided.

But neither *Knowlton v. Moore* nor the License Tax cases nor the kindred cases cited in the opinion in *Knowlton v. Moore*, are like the cases at bar. It is not the taxation of some business or property right which the states have the power to regulate and control that is objected to in this case. It is, on the other hand, a tax on the very right or privilege of existing at all, a very different thing. Such a tax on the privilege or right of existing is tantamount, it seems to us, to a tax on the right to create such an existence, and to fall within the other language of the opinion in *Knowlton v. Moore*, which declares that:

*“The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which*

*may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."*

We can not formulate to ourselves a more apt statement to apply to the Corporation Tax. Except for its requirement of publicity in the returns (which the court might not find so involved in the general intent and scheme of the law that it could not be adjudged unconstitutional without overthrowing the entire tax), the burdens of this particular tax law might not be considered intolerable, but it is intolerable to any believer in the reserved rights of the states that a power to destroy the privilege of existing as a legal entity granted by a state in the exercise of an exclusive right to do so, should reside in Congress.

Not such was the holding in the cases before referred to, cited in the opinion in *Knowlton v. Moore*.

The case of *Veazie Bank v. Fenno*, 8 Wallace, 533, may be considered the nearest in point to the contrary contention. But in that case it was plainly the exercise of one business only, which was allowed to the bank by the franchise creating it—that of circulating notes to pass as money—on which the tax fell, and that one a business which was a function in itself allowed the Federal Government.

This particular right or privilege, therefore, as has been well pointed elsewhere by one of the counsel in one of the cases now before the court, was subordinate to powers expressly conferred on Congress to provide a currency for the whole country by appropriate legislation. Under these circumstances it was more significant that two Justices dissented from the judgment affirming the validity of the tax on the ground that it affected the power of the state to create corporations, than that the Chief Justice, in voicing for the majority of the court the reasons for their decision, should have added to the sufficient ground of the powers of Congress over the currency, and to the statement that the tax was one not on any franchise of the bank but on property created or contracts made by the bank, a further statement that it could not "be admitted that franchises granted by a state are necessarily exempt from taxation, for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property."

Aside from the fact that this is a dictum only of the Chief Justice, it bears no such construction as the Government may be tempted to put upon it. That by "franchises," Chief Justice Chase meant

and meant only, particular and specific "franchises" or branches of private business allowed by state law to state created corporations, is shown not only by the whole tenor of the opinion, but by the fact that in the argument for the Government, it was only claimed that the tax was "an excise or duty on a branch of business" and that the power to tax included the power "to make taxation burdensome or even destructive to *particular branches of business*"—a proposition which we certainly do not dispute.

Our case falls rather within the general language of Mr. Justice Bradley speaking indeed of the attempt of a state to tax franchises granted by the United States:

"The power conferred emanates from and is a portion of the power of the Government that confers it. To tax it is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty."

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

For he further said in the same case:

"No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise*";

and this court has also said and repeated:—

*Collector v. Day*, 11 Wallace, 113;

*Van Brocklin v. Tennessee*, 117 U. S., at page 178; and

*Pollock v. Trust Co.*, 157 U. S., at page 584:

“The general Government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but the states within the limits of their powers not granted or in the language of the tenth amendment, ‘reserved,’ are as independent of the general Government as that Government within its sphere is independent of the states.”

But whatever may be said or thought of the right of Congress to tax a franchise or the privileges under a franchise granted by a state, either to exist or to do business, and whatever may be the extent of that right of Congress or its limitations—on one thing there is not and never has been doubt or difference. Congress can no more tax the public instrumentalities of the state than can the states tax such instrumentalities of the federal government.

This court said in *Ambrosini v. The United States*, 187 U. S., 1, that the law of self-preservation exempts any and all means and instrumentalities of state government from federal taxation.

The same doctrine explicitly declared—sometimes applied to attempts of the states to tax the instrumentalities of the federal government and sometimes to attempts of the federal government to tax the instrumentalities of the states—runs through the decisions of so many cases that to attempt to



make a catena of them is useless. It is the settled and recognized law of the land. A few of such cases may be cited:

*McCullough v. Maryland*, 4 Wheaton, 316.

*Collector v. Day*, 11 Wallace, 113.

*United States v. Baltimore and Ohio Railroad Co.*, 17 Wallace, 322.

*Railroad Company v. Peniston*, 18 Wallace, 5.

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

*Ambrosini v. United States*, 187 U. S., 1.

The Corporation Tax, as attested by all the arguments of its advocates; by the common knowledge that without the inclusion of the corporations which furnish transportation, water, light, intelligence-transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant; and by the internal evidence of its provisions for publicity which in the case of merely private business enterprises can find no plausible pretext of justification; was perhaps framed more for the purpose of falling on public service corporations than on any others.

The inclusion of these corporations within the operation of the law is (as we have said is also the case as to the income of corporations from real

estate and invested personalty) part of the warp and woof of the law, "constituting one entire scheme of taxation." If these corporations cannot be constitutionally taxed under it therefore, we submit the "entire scheme" must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases, and referred to in the first branch of this argument.

And what are these public service corporations but instrumentalities of the state?

They certainly are not the recipients of mere private privileges either of existing or doing business, and yet it is on the assumption that such is the character of the privileges granted to corporations by the state that the argument for the right of Congress to tax them rests. It is not necessary to advance any debatable theories or to discuss the propriety or advisability of a more specific and complete public ownership of these public utilities to negative the idea that when they exist in private hands, as the great majority of them do to-day, they are not nevertheless so far impressed with a public character and function that both by its grants to them and its demands from them the state creating them has made them and treats them as its agencies and instrumentalities to perform public services.

The most ardent individualist does not now deny that to them are given a part of the power of the state,—some of the attributes of its sovereignty which it can control at all times and can in many cases and under certain contingencies recall. That the function of a water company supplying water to a village community is a governmental function was distinctly asserted for example (and the example is only one of scores that could be cited) in *Rogers Park Water Company v. Fergus*, 180 U. S., 624. In the similar cases decided at the same time of *Freeport Water Company v. Freeport City*, 180 U. S., 587, and *Danville Water Company v. Danville City*, 180 U. S., 619, it was admitted by both majority and minority opinions in a discussion of the question unnecessary to go into here of the right of a municipality to make an irrevocable alienation of such a governmental function, that for Illinois at least the Supreme Court of that state seemed to have adopted a theory which if followed would prohibit such an alienation. We allude to these cases only to show how undisputed is the doctrine that these public service corporations are exercising, under grant of the state, governmental functions of the state.

But certainly no citation of authority is really necessary for this. Multitudes of these corporations, including practically all the intra-state as well as

inter-state traction or railroad companies, are given some right of condemnation under the doctrine of eminent domain. He certainly would be a bold man who would deny that that power was a grant of governmental function to an agent or instrumentality of the state. Under the principle of eminent domain every man holds his property subject to the supreme right of the sovereign to take it. But it is the right of the sovereign and of no one else. The state is the sovereign in our system by which this very highest power of government is often used to take from a man his homestead or his farm without his consent. But the state uses in doing it its instrumentalities and agencies which, in the form of public service corporations, exercise the power of condemnation given them, leaving to the courts in effect only the determination of the compensation. The right of the party whose property is taken for public use to compensation is an express constitutional one, and not a part of the common law doctrine of eminent domain. It is not the courts, it is the state through the corporation to which it has granted the power "to take private property for public use without the owner's consent," that exercises this sovereign power of eminent domain. Are not then the corporations that exercise it instrumentalities and agencies of the

state in the strictest and most precise meaning of those words?

We submit that a federal tax can neither be laid on the right of such corporations to exist nor on their right to do a public business. Truly in such a case the power to tax *is* the power to destroy the means which the sovereign state in the plenitude of its power has deemed the best instrumentalities through which to supply to its citizens the very necessities of life—water, light, transportation and information. The words of this court in *Veazie Bank v. Fenno* come back to us naturally for repetition;

*“The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope.”*

But if the “license or privilege” tax—that this Corporation Tax is claimed to be—cannot be validly placed on these public service corporations, we submit that it cannot be placed on any, for the inclusion by the law of public service corporations is an evident part of the intent under which the law was passed as “an entire scheme of taxation.”

## X.

Even were the law not to fail as a whole because of its inclusion of public service corporations as we strenuously insist that it must, yet the tax would lack validity against the defendant corporation in the particular case which we are arguing and against all similar corporations, made by the law of the state creating them public agencies and instrumentalities of the state in a form analogous to, although differing from, that which is the characteristic of public service corporations.

Our bill alleges that the Northern Trust Company, the principal defendant, has, among other powers granted to it by the State of Illinois,

1. That of receiving an appointment by any court of competent jurisdiction in the State of Illinois as trustee, receiver, assignee, guardian, conservator or administrator.

2. That of so becoming under order of court the depository of funds held by such officers as to discharge those officers from further care or responsibility for said funds.

3. That of so becoming such a depository with the effect of reducing or dispensing with the public bonds of said officers.

The bill also alleges that because of these semi-public functions which it is authorized to perform

the Northern Trust Company is held to very strict reports to and relations with the State of Illinois, and has been obliged to deposit with an officer of the state government \$200,000 in bonds of the United States or other approved securities.

The bill also alleges that the defendant, the Northern Trust Company, as a matter of fact has, under its charter-authority and by the provisions of state legislation been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars; and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignees and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees, with the said defendant corporation.

It is an agency through which to adopt language from *U. S. v. Baltimore & Ohio R. R. Co. (supra)*,

“The legislative, executive and judicial de-

partments of the state administer their own affairs in their own manner.

"This carries with it an exemption of these agencies and instruments from the taxing power of the federal government. If they may be taxed lightly they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted."

We submit without further argument that the allegations of fact above recited justify the further allegation of law made in paragraph seventeen of our bill that in the case of the Northern Trust Company, "in a peculiar and especial sense, the Corporation Tax is an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers."

Moreover, the allegations of the bill show that the Northern Trust Company "owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states," and that it derives an income of more than \$50,000 annually from these bonds.



On such bonds or on their income an undivided court in the *Pollock* cases (see Mr. Justice White's dissenting opinion at the first hearing, 157 U. S., 652), held that no federal tax *direct or indirect for any purpose whatever* can be imposed, because these bonds are the agencies and instrumentalities of the state governments. Nothing can be plainer than this holding or than the doctrine of the cases cited in the opinion of the court to sustain it. It seems to us that in substance and essence they apply whether the income be considered the thing taxed or the measure by which the tax is gauged.

Yet, as the bill alleges, the defendants intend, despite the protest of the complainant, to pay as this Corporation Tax, one per cent of the net income of the Company, including its income from municipal bonds.

That an injunction should have been granted by the Circuit Court against its doing so, we submit with confidence.

And with this proposition we purpose to close this argument, leaving to the court without further discussion from us the allegations of our bill in Paragraphs 19, 20 and 21, which call in question the retrospective nature of the tax as to income accruing before August 5, 1909, and the much criticized and

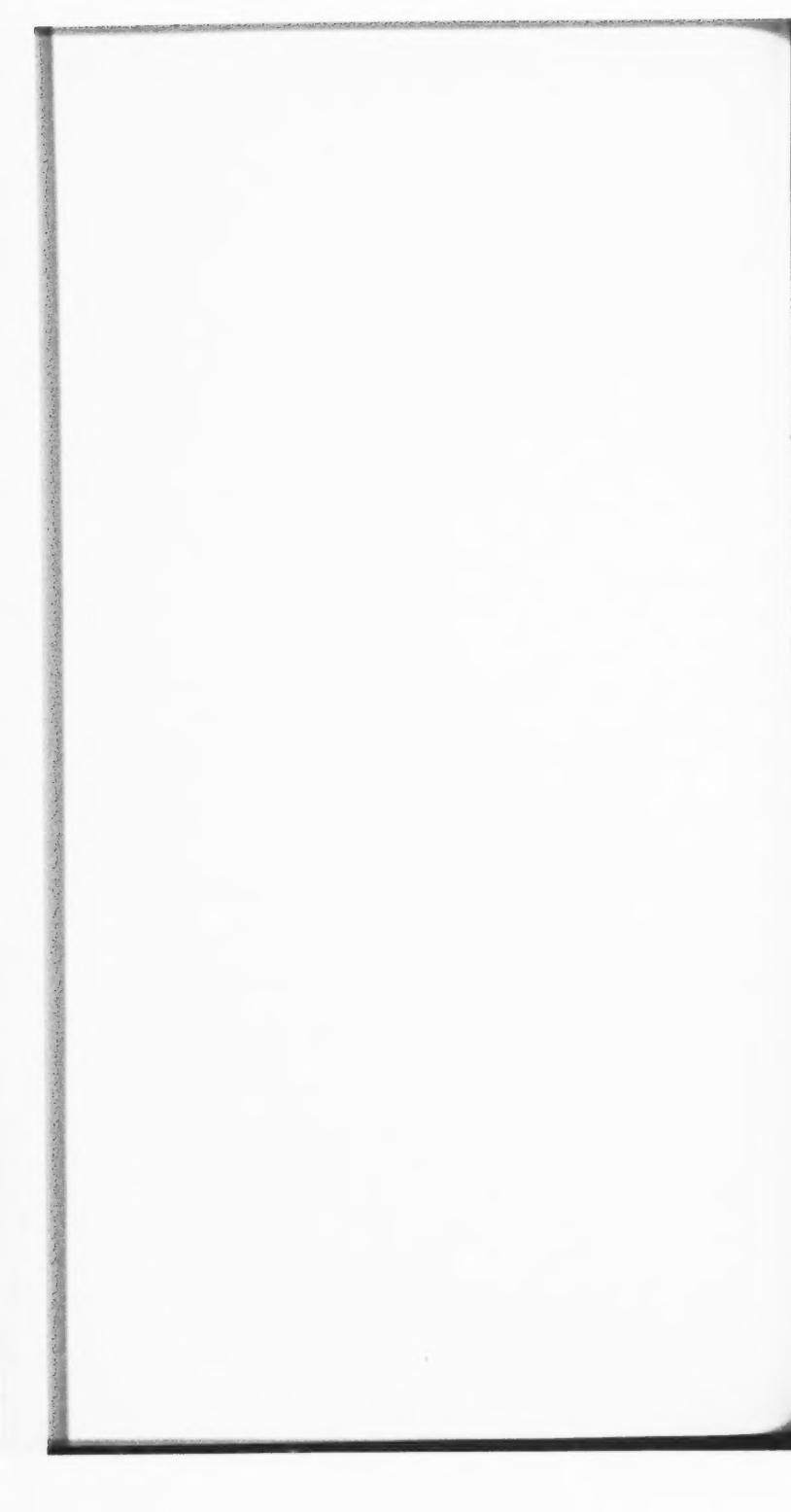
bitterly unjust provisions of the law which absolutely require publicity in matters which affect no public interest and subject to the discretion of the executive the divulging of more intimate and detailed information still—when such information has been obtained by inquisitorial and summary processes. These elements of the law, however inexpedient and ill-advised, might by themselves perhaps be upheld as within the discretion of Congress as a means of enforcing the tax, if in its essential substance it should be held valid or they might be overthrown without involving what we have designated as the warp and woof of the statute. We do not doubt however that they will receive full attention in these aspects from other counsel before the court. We have endeavored only to make plain our reasons based on fundamental principles for believing the entire enactment invalid and void, and we leave our contentions in the hands of the court, knowing that whatever its duty may seem to its members to be, it will be wisely and courageously done.

EDWARD OSGOOD BROWN,  
*Of Counsel for Appellant.*

GEORGE PACKARD and  
VINCENT J. WALSH,  
*Also of Counsel.*

PECKHAM, BROWN, PACKARD & WALSH,  
*Solicitors for Complainant.*





IN THE  
Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

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**No. 753.**

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FRED W. SMITH,  
*Appellant,*

*vs.*

THE NORTHERN TRUST COMPANY AND OTHERS,  
*Appellees.*

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Appeal from the Circuit Court of the United States for the  
Northern District of Illinois.

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BRIEF AND ARGUMENT FOR APPELLANT.

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STATEMENT OF THE CASE.

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This is an appeal from the Circuit Court of the United States for the Northern District of Illinois from a decree of that court sustaining a general demurrer to a bill in equity filed by the complainant and dismissing the bill at complainant's costs.

The appeal was taken direct to this court because the constitutionality of an act of Congress is involved. Except a possible question of jurisdiction, settled, as we understand, by previous decisions of this court, there is indeed no other matter involved

in the appeal than the constitutionality of Section thirty-eight of the Act of Congress entitled, "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States and for Other Purposes," approved August 5, 1909, and commonly known as "The Corporation Tax Law" of the United States.

The section is annexed as an appendix to this brief.

The bill alleges in detail and in apt, artificial language that the complainant, Fred W. Smith, is a resident and citizen of Illinois and the owner and registered holder of one hundred and forty shares (of the par value of fourteen thousand dollars) of the stock of the principal defendant, the Northern Trust Company, a corporation organized and existing under various acts of the General Assembly of Illinois; that he is informed and believes that the said Northern Trust Company and its directors, whom he makes defendants to the bill, intend voluntarily to make a return to the Collector of Internal Revenue for the First District of Illinois, of the net income of the Northern Trust Company, and of the other matters required to be stated in relation to its business for 1909, within the time required by the act for such return, and to pay, within the time required by the act for such payment, the tax of one per centum on its entire net income over five thousand dollars, provided for by

said act. This tax would, according to the allegations of the bill, be more than two thousand dollars, the net income of the defendant corporation for the year 1909 being over \$250,000.

The complainant alleges that the provisions of said Section 38 of the Act of August 5, 1909, are unconstitutional, null and void and furnish no justification for the payment of said tax or for the return as contemplated and intended by the defendants, and that he has requested the defendant company and its directors to refuse to pay the tax for said company or to make the return, and to contest the constitutionality of the law, but that they have refused his request; and that as the directors of said Northern Trust Company own more than a majority of the entire capital stock of said company, no effort on the part of the complainant looking to action of the stockholders to prevent the return or payment could be effectual.

The payment of the tax, the complainant alleges, would be a misapplication or diversion of the funds of the defendant corporation by its directors to the injury of the complainant, and a violation of the fiduciary duties of said directors to the complainant and the other stockholders.

Wherefore, the complainant asks an injunction against the defendants voluntarily making either

return or payment under the law in question, which he asks may be adjudged unconstitutional, null and void.

The bill in its successive paragraphs, from the first to the seventh, describes the nature, the business and the property of the defendant the Northern Trust Company; showing that its capital stock, surplus and accumulated profits exceed \$3,500,000; that it is by law authorized to do a general banking business and to take and execute trusts, and that it may, by express statute of the State of Illinois, be appointed by any court of competent jurisdiction in Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator; and that any such court, also by express statute, may order any such officer of which it has jurisdiction to deposit any funds in his hands, as such officer, with the said Northern Trust Company, and thereafter the officer shall be relieved from further responsibility for said funds.

To qualify itself to act under these laws the complainant was obliged to and did make certain deposits with the Auditor of Public Accounts of the State of Illinois, and to make certain reports of its affairs and business to said Auditor.

Thus, the complainant alleges, the Northern Trust Company

“was made by the effect of the statutes of Illi-



nois and its compliance therewith, in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois,”

and has as a matter of fact been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments, now holds, and is administering real and personal property of the aggregate value of many millions of dollars.

It is also alleged that the said Northern Trust Company owns and holds in its own right real estate in Chicago of the value of more than one million dollars, part of which is leased out to a tenant for the annual rental of nine thousand dollars.

That said defendant Trust Company

“owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by the Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states,”

and that said defendant Trust Company derives nine thousand dollars of its income annually from the rents of its absolutely owned real estate, more than fifty thousand dollars annually from its investments in interest bearing bonds of municipal corporations,

and a considerable and valuable income from its frequent appointment by the courts as Trustee, Receiver, Assignee, Guardian, Conservator, Executor, Administrator, and from the orders made by courts requiring or allowing such officers to deposit moneys with it.

The bill also alleges that the defendant, the Northern Trust Company, has held and is executing numerous trusts, committed to it by various parties and by various means and holds as trustee for many minors, individuals, copartnerships, associations, and corporations resident in the United States and elsewhere, many parcels of real estate exceeding a thousand in number.

The bill contains in its successive paragraphs from 14 to 21, particular averments concerning the unconstitutionality of said Corporation Tax Law.

**Thus:**

**PARAGRAPH FOURTEEN:**

Asserts that the said law is a direct tax in respect to the real estate held and owned by the Northern Trust Company and in respect to its personal property, and that although a direct tax, it is not apportioned among the states in proportion to their population as required by Section 2 and by Paragraph 4 of Section 9 of Article 1 of the Constitution.

## PARAGRAPH FIFTEEN :

Asserts that if the Corporation Tax should not be held a direct tax, but to fall under the denomination of an "Excise Tax" or any other than a "Direct Tax," then the provisions of the law are unconstitutional because they are not *uniform* throughout the United States. Uniformity, the bill claims, is explicitly required by Section 8 of Article 1 of the Constitution of the United States, as to all "duties, imposts, and excises," and is "implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

Subdivisions of this Paragraph 15 assert

A. That the Corporation Tax is not uniform as to *property, class or subject*, because although imposed upon corporations created and organized entirely under state laws and made by those laws persons resident in said states with all the rights of natural persons and of citizenship in those states, it is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying on the same or similar business under

like conditions and in the same localities and having like property and income.

B. That the said tax is not uniform even among corporations, as a great number of corporations, notably in Chicago where the defendant corporation is situated, having a less net income for 1909 than \$5,000, are exempted from the operation of the tax.

C. That the said tax is not uniform even among corporations in that in almost all localities where the tax would be operative there are a large number of corporations organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies and associations and insurance companies subject to said Corporation Tax, and whose entire income was so derived during the year 1909, and that said corporations by the effect of the law are equally with natural persons and copartnerships exempted from said Corporation Tax.

D. That the said tax is not uniform because of the existence of a large number of corporations organized under state laws, which derive a part of their income from such dividends from other corporations and that the tax upon such corporations is calculated at a different rate from the tax imposed upon other corporations doing a similar business under like con-

ditions, and deriving no part of their income from such dividends.

E. That the tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a Federal Income Tax on such persons while all other persons resident in the United States are exempt from any Federal Income Tax.

F. That the tax is not uniform in its effect upon corporations alone even, because of the exemptions therein contained of certain organizations named; said exemptions and classifications being arbitrary and unreasonable and based on no uniform or equitable classification, and many other corporations which by the terms of the Corporation Tax Law are subject to the Corporation Tax being equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. That if the Corporation Tax were held to be an Excise Tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations, and liabilities pertaining to a corporate franchise or its

exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state.

Illustrations are pointed out in the bill of this variance and it is asserted that a tax on the privilege of existing as a corporation and exercising a corporate franchise is neither uniform as to the different states of the United States nor as to the corporations within each state. Thus geographical as well as other uniformity is lacking.

H. That the tax is not uniform in other respects not specifically pointed out.

**PARAGRAPH SIXTEEN :**

Asserts that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also held to be uniform throughout the United States within the meaning of the Constitution of the United States, yet it must be held unconstitutional and void, as interfering with the reserved rights of the states under the Tenth Amendment to the Constitution.

In this paragraph it is more particularly alleged that the tax in question is not an excise tax, but whether so or not is, if not a direct tax on property or income, either a tax upon the privilege of existing as a corporation or a tax upon the privilege of doing business in a corporate capacity. In either

case the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the states have full power to grant.

It is further alleged that the tax is imposed on a great number of public service corporations in the various states, which perform public and semi-public intra-state functions, and have been given the power of eminent domain by the state for the purpose of enabling them to carry out said functions, and have thus respectively been made the direct instrumentalities and agents of the state creating them, with which Congress has no power to interfere.

The inclusion of these corporations in the operation of the law would by itself, it is alleged, render the law unconstitutional, but it is also claimed that in a wider sense all corporate franchises and all rights granted by a state to exist as corporate entities are instrumentalities of that state in the exercise of its reserved powers and functions, and cannot be constitutionally taxed or interfered with by the Congress of the United States.

**PARAGRAPH SEVENTEEN:**

Alleges that the reasons for holding the law unconstitutional, alleged in paragraph sixteen, apply

with especial force to the case of the defendant corporation in that it is a creation of the State of Illinois, that there has been given to it by the state the authority to perform the various public functions set forth in the second paragraph of the bill, and that by the courts of Illinois it has been given the responsibilities and placed under the obligations of such performance in many cases, and that the net income on which the Corporation Tax is imposed, or by which it purports to be measured, is in its case partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed on it.

PARAGRAPH EIGHTEEN :

Alleges the tax to be unconstitutional because it is an income tax upon the incomes of many corporations, including the defendant corporation, derived partly from state bonds and municipal bonds issued under state authority, and United States bonds, and that these bonds are not within the taxing power of Congress.

It is particularly alleged in this paragraph that the respective bonds of the state and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation; and



That the income and interest from said bonds constitute a considerable proportion of the net income of many of the corporations on which the Corporation Tax purports to be imposed, and that it was and is the intention of Congress and is essential and necessary to accomplish the purpose and general scope of the Corporation Tax; that these corporations and the income thus derived should be covered by the law.

PARAGRAPH NINETEEN:

Alleges the provisions of the Corporation Tax Law to be unconstitutional in that they impair property rights vested prior to the passage of the act, and in that they purport to impose a tax on the net income of corporations which accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

PARAGRAPH TWENTY:

Alleges the law in question to be unconstitutional in that all corporations thereby taxed, may, under its provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution.

## PARAGRAPH TWENTY-ONE:

Alleges that the provisions of the Corporation Tax Law are unconstitutional in that all corporations thereby taxed may be compelled to disclose their private books and papers in order to make them liable to a penalty or to forfeit their property, and in any event are obliged to make returns of their private business in such manner that they become public records, open to competing and hostile examination, although the said corporations making them may have no public functions nor be affected with a public interest, and in that special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the president, all of which provisions are in violation of Article IV and V of the Amendments to the Constitution.

There are formal allegations in the bill negating collusion to confer jurisdiction and asserting as grounds of jurisdiction additional to that of the threatened diversion of funds by the directors and breach thereby of their fiduciary duties, that the voluntary compliance with the provisions of the law will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous

shareholders, and that such numerous suits would work irreparable injury to the business of the defendant company and the irreparable damage of its stockholders.

To this bill there was filed a joint and several demurrer of each and all of the defendants.

The Circuit Court, as above indicated, sustained the demurrer and dismissed the bill and this appeal was taken.

It was advanced for hearing under Rule 26.

## ASSIGNMENT OF ERRORS.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that the Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

BRIEF OF ARGUMENT.

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## I.

Our bill (abstracted in the "Statement") sets out in Paragraphs and Sub-paragraphs—pages 2 to 15—the various grounds on which we attack the constitutionality of the Corporation Tax Law. We rely on them all but to avoid burdening the court with repetition shall argue only those following:

Argument, pages 27 to 30.

## II.

The cases of *Pollock v. Farmer's Loan & Trust Co.* and *Hyde v. Continental Trust Co.*, 157 U. S., 429, and 158 U. S., 601, set at rest the questions involved therein.

We shall not, for reasons set forth in our argument, discuss preceding cases claimed to be inconsistent therewith.

Argument, pages 30 to 32.

## III.

The question of jurisdiction in the present case is controlled by the *Pollock* cases, and however grave as a matter of first impression, is no longer open.

*Corbus v. Alaska Treadwell Gold Mining Company*,  
187 U. S., 455, distinguished.

Argument, pages 32 to 34.

#### IV.

The *Pollock* cases decided (1) that taxes on the rents and income of real estate are direct taxes, and subject to the rule of apportionment; (2) that taxes on the income of personal property are direct taxes, subject to the same rule; and (3) that the Income Tax Law constituted one entire scheme of taxation and being invalid as to the income from real estate and personal property, was invalid as a whole.

The Corporation Tax—if it be an income tax—falls within the effect of each of these conclusions.

Argument, pages 34 to 42.

Under this point we urge:

(a) That in the case at bar the tax, if it be an income tax, falls on income of The Northern Trust Company from both real estate and invested personalty, including the bonds of municipal corporations.

Argument, pages 36, 37 and 41.

(b) That equally with the Income Tax Law of 1894 the Corporation Tax Law of 1909 is one entire scheme of taxation, and being so, must fail as a whole if it fails in essential parts. Citing:

*Pointdexter v. Greenhow*, 114 U. S., 270.

*Sprague v. Thomson*, 118 U. S., 90.

*Warren v. Charlestown*, 2 Gray, 84.

Argument, pages 37 to 42.

## V.

The Corporation Tax is an Income Tax, and being unapportioned is unconstitutional.

Despite the attempt of its framers by mere phraseology to negative the idea that it is an income tax, it remains so because of its essential character and substance.

*Stockard v. Morgan*, 185 U. S., 27.

*Asbell v. Kansas*, 209 U. S., 251.

*Galveston, Harrisburg and San Antonio Railway Co. et al. v. Texas*, 210 U. S., 217.

Argument, pages 41 to 48.

Under this we contend:

(a) That while a tax in certain cases may be laid on an intangible right or privilege in proportion to the value of some other property without being a tax on that property (as held in *R. R. Co. v. Collector*, 100 U. S., 595; *Home Insurance Co. v. New York*, 134 U. S., 594; *Plummer v. Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York v. Roberts*, 171 U. S., 658), this is only true (1) where the value of the property by which the tax is

gauged is a reasonable measure of the value of the intangible right or privilege, or (2) where the intangible right might be altogether taken away by the taxing government and may therefore be conceded only on such conditions as that government pleases.

(b) That neither of these conditions exists as to the Corporation Tax Law. It is not within the power of Congress to deny or concede to the corporations affected their right to exist or to do business, nor is the tax proportioned to business done by them or conditioned upon their doing business at all. It falls directly on their income from all sources.

(c) That the case of *Spreckels Sugar Refining Company v. McClain*, 192 U. S., 397, relied on to sustain the constitutionality of this tax as an excise tax is not in point. Its true effect is to the contrary.

## VI.

If the Corporation Tax should be held not to be an income tax but an indirect tax, it must be held to be a discriminating license or privilege tax, merely arbitrarily measured by the income of the persons selected for taxation. The question then recurs: For what privilege is the tax to be paid?

It cannot be the privilege of holding property, for that would make the tax identical with a tax on property and direct. It must, in the case of a corporation, be either the privilege of existing as a



corporation or of doing business as a corporation. While it makes little difference to our argument, we contend that it must be the privilege of existing as a corporation rather than doing business as a corporation for the tax is neither proportioned to nor conditioned on the doing of business. In the case of joint stock companies and insurance companies, the tax must be on the privilege of existing as such companies.

Argument, pages 49 to 61.

## VII.

Whether a tax on the privilege of being a corporation or of doing business as a corporation, the Corporation Tax is subject to the rule of "uniformity," which is *implicitly* required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax.

The Corporation Tax violates this implicitly required uniformity. Its selection of the persons to be taxed for the privilege of existence or of doing business is so "arbitrary and confiscatory" that it "transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Therefore this court should interfere.

*Knowlton v. Moore*, 178 U. S., 41.

The corporations created by the states are to the United States in the same relation as natural persons who are citizens of those states and cannot be arbitrarily selected for taxation on the privilege of existing or doing business.

*Louisville C. & C. R. Co. v. Letson*, 2 Howard, 497.

*Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

*Ohio & M. R. Co. v. Wheeler*, 1 Black, 286.

*Bank of Augusta v. Earle*, 13 Peters, 519.

*St. Louis v. Wiggins Ferry Co.*, 11 Wallace, 423.

*San Bernardino County v. Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

*Pembina C. S. M. & M. Co. v. Pennsylvania*, 125 U. S., 181.

*C. C. & A. R. Co. v. Meekey*, 142 U. S., 386.  
Argument, pages 61 to 67.

## VIII.

The Corporation Tax if not a direct tax is subject to the express requirement of "uniformity" in Section 8, Article 1, of the Constitution.

Even if the *expressly* required "uniformity" is merely a geographical uniformity between the states,

as held in *Knowlton v. Moore* (*supra*) and *Patton v. Brady*, 184 U. S., 608 (see, however, the concurring opinion of Mr. Justice Field, with whom three other members of the court agreed on this point in *Pollock v. Farmers Loan & Trust Company*, 157 U. S., 586), the Corporation Tax does not conform to it.

Argument, pages 68 to 76.

Under this point we contend that as the right or privilege of existing as a corporation or as a joint stock company or as an insurance company and the right or privilege of doing business as any one of them are very different things in one state from what they are in another, because of the differing laws of the states (for example, freedom of a corporation stockholder from individual liability exists in New Jersey but not in California), and as this court takes judicial notice on this appeal of the laws of all the states (*Hanley v. Donoghue*, 116 U. S., 1; *Fourth National Bank v. Franklyn*, 120 U. S., 747; *Case v. Kelly*, 133 U. S., 21; *Mills v. Green*, 159 U. S., 651), the Corporation Tax is within the judicial knowledge of the court unequal and wanting in uniformity between the states.

## IX.

The Corporation Tax is unconstitutional whether direct or indirect and whether uniform or not, because it is an attempted interference with the instrumentalities of the states.

*McCullough v. Maryland*, 4 Wheaton, 316.

*Collector v. Day*, 11 Wallace, 113.

*United States v. Baltimore & Ohio Railroad Co.*, 17 Wallace, 322.

*Railroad Co. v. Peniston*, 18 Wallace, 5.

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

*Ambrosini v. United States*, 187 U. S., 1.

Argument, pages 77 to 91.

Under this point we first contend:

(a) That the supposed power of Congress to impose this tax involves the power to destroy the power of the states to grant franchises or privileges of corporate capacity and the value and purpose of such franchises and privileges.

(b) That such power to grant acts of incorporation is practically unlimited in the states and incident to sovereignty.

*Briscoe v. The Bank of Kentucky*, 11 Peters, 257.

(c) That the tax is on the existence of a corporation and involves the right to destroy it.

(d) That while as held in *Knowlton v. Moore* Congress may tax, even though it involves the power to destroy, some business or property right of a citizen or corporation, it has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence.

*California v. Central Pacific Railroad Company*, 127 U. S., 1.

*Collector v. Day*, 11 Wallace, 113.

*Van Brocklin v. Tennessee*, 117 U. S., 151-178.

(e) That the cases of *Knowlton v. Moore* and *Veazie Bank v. Fenno*, 8 Wallace, 533, which we discuss, hold nothing to the contrary of our contention.

Argument, pages 80 to 86.

And, secondly, we contend under this point:

(a) That whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the state in the strictest sense and for that reason are given the power of eminent domain; that the functions of many of them are indeed governmental, *e. g.*, the functions of water companies.

*Rogers Park Water Co. v. Fergus*, 180 U. S., 624.

*Freeport Water Company v. Freeport City*,  
180 U. S., 587.

*Danville Water Company v. Danville City*,  
180 U. S., 619.

(b) That the inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock* case.

Argument, pages 86 to 91.

## X.

Finally,—we contend that under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and that in its case therefore the Corporation Tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers:

Argument, pages 92 to 94.

And also,—that the income of municipal bonds to a very large amount is included in the income on which the Northern Trust Company threatens to pay one per centum as a tax, that such income from instrumentalities of state governments has been explicitly declared by this court untaxable by Congress directly or indirectly for any purpose whatever (*Pollock v. Trust Co.*, 157 U. S., at page 584 *et seq.*), and that this threatened action should be enjoined, independently of all other considerations.

Argument, pages 94 and 95.

## ARGUMENT.

(The dividing Roman numerals relate to the corresponding numbering in the preceding Brief or Abstract of the Argument.)

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## I.

The bill in this cause sets out clearly the grounds on which the constitutionality of the law involved is attacked. We submit that upon all and each of the grounds alleged it is invalid. There are several cases involving the constitutionality of this law, to be heard together. Many of these grounds are set forth with equal force by the other parties appellant, and from the ability and learning of the counsel who represent those parties, we know that these grounds will be argued by them in this hearing with great thoroughness. Therefore, without waiving any of the matters stated in our bill in this case or being willing to be understood to minimize in any degree the gravity and conclusiveness of the various constitutional objections to the law which our bill points out, we do not conceive it will aid the court to elaborate in detail in our brief and argument all or many of them and thus by duplication of citations and syllogisms place on the court an unnecessary and superfluous burden. This would be the less justifiable because the matter in-



volved—the limitations of the taxing power of Congress—although of such immense importance, is one with which the members of the court are necessarily as familiar as counsel, however diligent, conscientious and ardent, can have possibly made themselves.

It has been the subject of its most serious consideration many times since the institution of the Government. In nothing have the wisdom, the learning and the courage of this great tribunal been more signally exemplified than in its treatment of it.

All the authorities of importance which counsel can cite on the questions involved are the utterances of this court.

These utterances are of necessity familiar to it. They must be the more so because in all the later ones, made while a large portion of the personnel of the court was the same as now, the earlier ones were discussed and distinguished, and where need was, limited and modified.

The vigor of the dissent and the thoroughness and force with which the views of the minority of the court were set forth in some of the later cases, for example in those which must of necessity prove of greatest (and as we contend of controlling) importance in the discussion of the cases at bar, but add dignity, strength and conclusiveness to the equally

well considered conclusions of the majority who were unconvinced by them, and whose opinions voiced by the Chief Justice declared for this court and therefore for the country the construction which the Constitution must bear as applied to the questions involved in those cases.

We allude, of course, to *Pollock v. Farmer's Loan & Trust Co.*, and *Hyde v. Continental Trust Co.*, argued together twice, and reported in 157 U. S., 429, and 158 U. S., 601, which we shall hereafter cite merely as the *Pollock* cases.

## II.

In view of the wealth of argument analytical and historcial with which in the arguments of counsel on either side and in the various opinions of judges in the *Pollock* cases, the opinions of this court in *Hylton v. The United States*, 3 Dallas, 171; *The Pacific Insurance Company v. Soule*, 7 Wallace, 433; *Veazie Bank v. Fenno*, 8 Wallace, 533; *Scholey v. Rew*, 23 Wall., 331, and *Springer v. The United States*, 102 U. S., 586, were discussed, we shall not attempt to construe those cases or to comment on them save only as any one of them may seem to be relied on to establish some proposition unrelated to those which we believe were forever set at rest in the *Pollock* cases. They were of supereminent importance in the

discussion of those latter cases, and were so recognized by court and counsel alike, but the proper scope to be given them, the limitations to which they were to be held, and their varying degrees of authority were so settled in the *Pollock* cases, that we shall leave to others, if they will, to reopen a discussion on them. We shall treat as the fundamental and basic legal positions on which the constitutionality of the Corporation Tax Law is to be adjudged, the conclusions of the court embodied in the opinions of the majority in the *Pollock* cases. Behind them, to discuss the questions involved in those cases, and to distinguish preceding cases which have been claimed to be inconsistent with them we shall not go. The deluge may be taken for granted.

This was indeed the position taken by the framers and proponents of the law under discussion. It is a matter of common knowledge that it was passed as an alternative to an Income Tax, *eo nomine*, on the incomes of persons natural or artificial. It was so passed because the decision of the *Pollock* cases stood like an impassable wall between the desires of those who wished such an unapportioned income tax, and its enforcement if passed. It was recognized that this tribunal would be unlikely to depart in less than two decades from judgments so thoroughly considered and so carefully weighed. More-

over, it was then, and it is now, the natural conclusion of all thoughtful men, that it would injure the prestige of and even weaken the confidence of the people in all courts for this court to overrule a decision which upon such elaborate argument and elaborate consideration it had rendered against the constitutionality of an Act of Congress.

### III.

For the same reason we shall not linger over a discussion of the jurisdiction of the courts below and of this court over the cases at bar. We are entirely willing to concede the gravity of the question raised by the existence of the Act of 1867, which is Section 3224 of the Revised Statutes of the United States, providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." That question was thoroughly discussed in the dissenting opinion of Mr. Justice White in the first hearing of the *Pollock* cases. But we submit that it can not for a moment be supposed that the court will now, in these cases, recede from the position which Mr. Chief Justice Fuller so tersely stated in the opening paragraphs of the opinion of the court in that same hearing:

"The jurisdiction of a court of equity to prevent any threatened breach of trust in the mis-

application or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge v. Woolsey*, 18 Howard, 331; *Hawes v. Oakland*, 104 U. S., 450.

"As in *Dodge v. Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of and paying an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury."

This fully disposes for the cases at bar of the question of jurisdiction, however grave it might be, and was considered as a question of first impression. The cases at bar are, so far as this matter is concerned, precisely similar to the *Pollock* case and the *Hyde* case, and we do not need to make the additional suggestion that in these cases, no more than in the *Pollock* cases, have the defendants or the Department of Justice, which represents them, raised below or insisted on here this objection, or that of an adequate remedy at law. "So far as it is within the power of the Government to do so," undoubtedly the question of jurisdiction will be waived, for nothing can be more important than for the Treasury Department and its officers, and the Department of Justice and its officers to have from this court, before the payment of the tax becomes due, an authoritative statement on its widely contested validity. Without it, the litigation which will

flood the courts of the country by suits against collectors to whom money has been paid under protest or who are alleged to have made illegal exactions, will be overwhelming and intolerable.

*Corbus v. Alaska Treadwell Gold Mining Company*, 187 U. S., 455, was distinguished from the *Pollock* case, and the decision justifying the dismissal of the bill by the court below was not put on the applicability of the Statute of 1867, but on the absence of a demand by the complainant on the directors to protect the corporation against the alleged illegal tax. Had he shown an effort to do so, even, the court says, "a different case would have been presented."

In our cases, as in all the others before the court in this hearing, the allegations of an effort to secure the action of the directors of the several companies to protect the complainants are not only alleged but particularly set forth.

#### IV.

In pursuance of the plan indicated for our argument therefore, we address ourselves at once to that which in most important aspects is the one thing necessary to decide at the outset of the inquiry.

The law, before it passed the Senate of the United States, was most vigorously and exhaustively dis-

cussed. It was urged by many constitutional lawyers there, and is our position here, that it levies a direct tax on incomes. If it should be so held by this court, there is an end of the argument, for if the tax be an income tax, it is not the less obnoxious to the constitutional objection that it is an unapportioned direct tax, because instead of being levied on all persons natural and artificial, having an income above a certain figure, as was the Law of 1894 adjudged invalid in the *Pollock* cases, it is limited to corporations (that is, a particular kind of artificial persons constituted by the various states entities with the rights of natural persons resident within the state), together with associations of natural persons, not corporations, pursuing the particular business of insurance, or having a capital stock represented by shares.

And the *Pollock* cases decided that a general tax on incomes derived from "any source whatever" is a direct tax and cannot be levied unless apportioned among the states in proportion to their populations.

It is true that before summing up its conclusions at the final hearing of the *Pollock* case, the court declared that it had considered the act only in respect of the tax on income derived from real estate and from invested personal property, and, as the opinion declares, had not "commented on so much

of it as bears on gains or profits from business privileges or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax, and been sustained as such."

But to the two conclusions which found: *First*, that taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes; and, *Second*, that taxes on personal property or on the income of personal property are likewise direct taxes, the court added a *Third*: That as the tax in question, so far as it fell on the income of real estate and of personal property was a direct tax within the meaning of the Constitution and therefore unconstitutional and void because not apportioned according to representation; the entire law "*constituting* one entire scheme of taxation" was necessarily invalid.

Within the necessary effect of each of these conclusions falls the case which we are arguing.

In its application to a great multitude of corporations throughout the country, and especially and definitely in its application to the corporation involved in this case of *Smith v. The Northern Trust Company*, the Corporation Tax, if it be a tax on income, falls on income from both real estate and from invested personalty.



The bill to which the demurrer was sustained expressly sets forth that the Northern Trust Company may by law loan money on personal and real estate security; that it may execute trusts of every description; that in its trust capacity it is administering real and personal property of the aggregate value of many millions of dollars; that it derives an income from such sources, and that it holds in its own right real estate located in the City of Chicago of the value of more than one million dollars, from a part of which it receives income and rents of about nine thousand dollars per annum, and that it derives an income of more than fifty thousand dollars annually from its investments in interest-bearing bonds of cities, counties, public parks, and other municipal corporations, and that the Corporation Tax is a direct tax in respect of its real estate and personalty.

It has been suggested that even were the law to be held unconstitutional in its attempt to tax income from investments in real and personal property, it might be held valid as to all other, or some other income.

We submit that this position is untenable. As in the Income Tax Law of 1894, the provisions of the Corporation Tax Law of 1909 constitute one entire scheme of taxation. The taxation of income

arising from real estate and from invested personal property is in both laws a part of the warp and woof of that scheme. In neither case, it is apparent, would Congress have been willing to pass a law which should have exempted or taken no account of such income from real estate and personalty, while levying on, or measuring the tax by, the remaining income of all persons taxed in one case and of the selected persons taxed in the other.

The essential language which describes the income on which the tax is to be levied is nearly identical in the two acts. In that of 1894 the tax was expressly levied on

"the gains, profits and income received in the preceding calendar year by every citizen of the United States \* \* \* and every person residing therein, whether said gains, profits or income be derived from any kind of property, rents, interest, dividend or salaries, or from any profession, trade or employment or vocation \* \* \* *or from any other source whatever.*"

In that of 1909:

"Every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company \* \* \* shall be subject to pay annually a \* \* \* tax \* \* \* equivalent to one per centum upon the entire net income \* \* \* received by it *from all sources during such year,*" etc.

We fail to see any reason for holding as against

corporations, the law of 1909—if invalid so far as it affects the income from real estate and invested personalty—good in part and as affecting certain other kinds of income, which was not of equal force for holding as against all persons (corporations as well as others) the law of 1894, although invalid so far as it affected the income from real estate and invested personalty, good in part and as affecting such other kinds of income.

But this court, at the final hearing of the *Pollock* case, in cogent words rejected the argument in favor of such a holding as to the law of 1894, and in doing so cited and quoted with confirmatory approval the language of this court in *Pointdexter v. Greenhow*, 114 U. S., 270, and in *Sprague v. Thomson*, 118 U. S., 90, and the language of the Supreme Judicial Court of Massachusetts, by the mouth of Chief Justice Shaw, in *Warren v. Charlestown*, 2 Gray, 84. It would serve no useful purpose to repeat that language herein. The statement in each case is an enunciation of the established rule that courts cannot, in order to establish the partial validity and effect of a law, confer upon it a partial and discriminating operation which they cannot say the Legislature would have desired and provided for in the absence of the invalid portion of the law.

Can it be even doubtful that Congress would have declined to pass the Corporation Tax Law of 1909 had the income from the real estate and invested personalty of all corporations been by its provisions exempted from the income on which the tax was to be computed? It even refused to heed the recommendation of the President who suggested the exclusion of national banks, whose income is practically all from invested personalty.

It is perhaps not too much to say that the chief arguments used for the passage of the law gained all their force from the fact that corporations in the opinion of many of its supporters were absorbing an undue proportion of the resources of the country in their holdings of real estate and in their accumulation of immense amounts of invested personal property.

To hold the tax valid as to other income of corporations but not as to the income from these factors in corporate wealth would be actually to effect the exact opposite of that which Congress desired. It would be to tax corporations so far as they are active and useful business bodies and exempt them so far as they are rich, idle, and grasping.

And yet if it be only doubtful even, whether Congress would have passed the law emasculated in the manner suggested, this court must, if it ad-

judges it invalid as to the income from real estate and invested personal property, declare it invalid altogether, for, in the language of Mr. Justice Mathews in *Pointdexter v. Greenhow*:

“To hold otherwise would be to substitute for the law intended by the Legislature one they *may* never have been willing to enact.”

Before we proceed to a discussion of what the Corporation Tax is levied on, and what is its proper designation, we call attention to the fact that in the case of the defendant corporation, the bill alleges that an income of over fifty thousand dollars is derived by the Northern Trust Company annually from municipal bonds, bonds the income of which the unanimous opinion of the court in the *Pollock* cases (as distinguished from its holding on all other contentions), decided could not be taxed by the Federal Government because such bonds were the instrumentalities of the state. We shall return to this consideration later and in another connection, but we stop to allude to it here to ask further, whether it can be conceived to have been even the intention of Congress to tax the incomes of all the corporations of the country, save and except that derived by its trust companies and banks and other financial corporations from municipal bonds. Setting aside the matters on which the court was divided in the *Pollock* case—the validity of the unapportioned

federal taxation on the income of real estate and personaity—we have, if this Corporation Tax be a tax on incomes, in the attempted taxation of the income of state and municipal bonds a factor and component part of “one entire scheme of taxation,” which factor and part an undivided court in the *Pollock* case found impossible and invalid.

## V.

Thus we are brought in this main branch of our argument directly to the question: Is this Corporation Tax an income tax?

It is true the act imposing it does not so denominate it. Indeed, it is conceded at the outset that in its mere phraseology (but in its phraseology only) the first care of its framers and proponents was to negative the idea that the tax enacted was to be an income tax.

It was to be “a special excise tax”—if calling it so could make it so. It was not to be “one per centum upon the entire net income, etc.” It was to be “equivalent to one per centum upon the entire net income, etc.” It was not even to be a tax “on the carrying on or doing business by such corporation, etc.,” but a tax “*with respect to* the carrying or doing business, etc.”

The adoption of this last language from the opin-

ion of Mr. Justice Harlan in the *Spreckels* case (*Spreckels Sugar Refining Company v. McClaim*, 192 U. S., 397), where it was entirely in place, to use it in a legislative act where it was emphatically out of place (for it is juridical, not legislative, phrasing), accentuates the foreboding of the authors of the law that it could not readily pass the tests to be applied by this tribunal. To secure this end they called the tax that which it was not—"an excise tax"—they resorted to what, with all respect, be it said, seems to us the trivial expedient of using the words "equivalent to," instead of the word "of"; and they used juridical in place of apt legislative language in the hope that by the use of these words alone they could, as it has been expressed, "attach this tax to the business rather than to permit it to be attached to the property."

We submit that the authors of the law, able and ingenious as they were, were attempting an impossibility. This court would not exercise the high prerogative of finding a tax levied by the Congress of the United States unconstitutional and void if phrased in one set of words, but, although exactly the same in substance and result, constitutional and valid if phrased in another. Such refinements and technicalities are not practices of great tribunals, least of all of this one. The Income Tax of 1894, ad-

judged void in the *Pollock* cases, would not have been held valid had it run, "There shall be assessed, levied, collected and paid annually, with respect to the carrying on of the business of receiving income, gains and profits, by every citizen of the United States, whether said gains, profits or income be derived from any kind of property, etc., \* \* \* or from any other source whatever, a tax equivalent to two percentum on the amount so derived, etc." Not such are the methods of this court, which looks through all legal fictions and pretenses straight to the heart of the matter involved.

It will have no sympathy with an astuteness which plays fast and loose with language in legislation in the hope that by using one phrase a purpose can be accomplished constitutionally, which comes into collision with the Constitution, if another in substance and real effect identical, is used.

Citation of authority is not needed for so plain and patent a truth, but express authority of this court is not wanting to this very proposition.

In *Galveston, Harrisburg and San Antonio Railway Company et al. v. Texas*, 210 U. S., 217, in holding that the State of Texas could not impose a certain tax upon railway companies equal to one per centum of their gross receipts, Mr. Justice Holmes, in the opinion of the court, says:



“Neither the state courts nor the Legislatures” (and the same rule must apply to Congress) “by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.”

And again:

“This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words ‘equal to.’”

And he cites, in support of his language,

*Stockard v. Morgan*, 185 U. S., 27, and

*Asbell v. Kansas*, 209 U. S., 251.

Passing from mere phraseology to real substance, what is the Corporation Tax levied on? If not on incomes, on what does it fall? It has certainly all the *indicia* of an income tax.

As has been well said by another (Machen on The Federal Corporation Tax), *prima facie*, a tax is laid upon that in proportion to which its amount is measured; and where a tax may be laid on an intangible right or privilege, in proportion to the value of some other property, without being a tax on that property (as it is conceded that this court has held it may in some cases be: *Railroad Company v. Collector*, 100 U. S., 595; *Home Insurance Co. v. New*

*York*, 134 U. S., 594; *Plummer v. Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York v. Roberts*, 171 U. S., 658), it is because the value of the property by which the tax is gauged is a reasonable measure of the value of the intangible right or privilege, or where the intangible right might be altogether taken away by the taxing government and may therefore be conceded on such conditions as that government pleases.

Neither of these conditions exist as to the law under discussion.

It cannot, we submit, properly be held or considered to be a license or privilege tax on the right to be or to do business as a corporation, for it is not within the power of Congress to deny or concede such powers to a corporation like the defendant corporation here (and like the great majority of those corporations which this tax affects), or to prescribe the conditions on which they may be exercised within the state creating it. We shall have occasion to discuss this proposition in another aspect in a subsequent branch of our argument, but we state it here, as a reason for its being impossible to hold this tax anything but an income tax on the ground that it is merely proportioned or measured by the income.

Nor despite the peculiar phraseology which calls

it a tax "with respect to the carrying on or doing business," can it be considered a tax on doing business at all. It is not proportioned to the amount of business done by the corporation or other association or company taxed, nor to the amount of income received from any such business, but to "the net income over and above five thousand dollars received by it *from all sources* during such year, exclusive of amounts received as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed." In the case of companies organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska, it is imposed on them whether they do any business or not. The net income which these companies derive may be entirely from real estate, or entirely from invested personalty, it may indeed be from the municipal bonds which, and the income from which, this court has unanimously declared Congress cannot tax. The companies may be doing no business—but be merely "incorporated gentlemen of leisure" (Vann, J., in *People v. Roberts*, 154 N. Y., 1), or they may be doing business at a loss, more than made up by their income from real estate or invested personalty before accumulated. But in

each case this tax of one per centum falls with the same force and directness on their income over five thousand dollars.

What is this but an income tax? And how does the expedient of calling it "A Special Excise Tax" alter or conceal its true character? And is it any less obnoxious to the objections to its constitutionality because it is levied on some citizens and persons (artificial and natural) over whom and whose business Congress has no visitatorial or regulatory power, rather than on *all* the citizens of the country, as was the Income Tax of 1894?

Unless these questions can be answered satisfactorily—in a sense different from that which seems to us the obvious one—this tax must fall as within the construction of the Constitution laid down in the *Pollock* case.

The case of *Spreckels Sugar Refining Company v. McClain*, 192 U. S., 397, is especially relied on as an authority which will sustain this tax as an "Excise" tax and negative the proposition that it is an "Income" tax. We cannot so consider it. Its effect seems to us the opposite. The tax involved in the *Spreckels* case was imposed on the gross receipts in their business of *all* persons carrying on either of two specified occupations. It was therefore certainly an "Excise Tax." The court expressly held that

the tax being an excise tax on the particular occupations named, no part of the gross receipts made the measure of the excise not having a necessary connection with those occupations could be considered in fixing the amount of the tax, and reversed and remanded the case because they had been so considered.

The tax involved in the cases at bar, does not purport to be measured by the receipts in any particular business or in business at all. It is, like the Income Tax of 1894, measured by an income from "all sources." It does not fall on all persons engaged in any particular occupation or occupations. It falls on one peculiar kind of persons by virtue merely of their existence and their having an income, as the Income Tax of 1894 did on all citizens by virtue of their existence and income. It is neither in spirit nor letter within any holding in the *Spreckels* case.

## VI.

To the conclusion that the Corporation Tax Law provides for an income Tax and must therefore stand or fall by that description, our own opinion is that there is no admissible contradictory or alternative proposition.

As a tax on the income from real estate and in-

vested personal property owned by the corporations and the other associations subject to the tax, it cannot, because unapportioned, be sustained by this court, unless the court is prepared to depart from its decision in the *Pollock* cases. Of that possibility we shall take no further account, for nothing that we could say would render less remote the contingency nor add force to the arguments for adherence to it which are already in the minds of the court.

Whether or not the Government will concede that if the Corporation Tax is an Income Tax it falls within the ruling of the *Pollock* cases, we do not know.

Whether or not, if such a concession be made, it would ask the court to recede from anything laid down in the *Pollock* cases, we do not know.

We do know, however, that the Government does not concede that the Corporation Tax is in any sense an Income Tax, but holds fast to the theory that it is, as it terms itself, "A Special Exoise Tax." We pass then as in pointing out in our bill the constitutional objections to the law we did, from our own view of its real nature to that taken by the Government, shifting the battleground only that we may meet the defenders of the law on their own chosen field and with their own weapons.

In the further discussion of the questions involved, for the sake of the argument, and for the sake of the argument only, we shall eliminate from consideration the thesis of the truth of which we are really convinced, that the Corporation Tax is an Income Tax, and therefore a direct tax, and adopt the other, which we have indicated, we believe inadmissible; that it is, if not as it calls itself, "A Special Excise Tax," at least an indirect tax.

We do not care in this branch of the argument more than in the preceding one to haggle over the mere meaning and use of words. Therefore, we shall enter on no discussion of whether admitting this tax to be indirect and not an Income Tax, it is properly termed an "Excise Tax." We think it might be easy to show from the definitions of the word "Excise" as applied to governmental impositions, by legal and general lexicographers alike, from the famous unjustifiably prejudiced exposition of Dr. Johnson, to the present time, that the strictly proper use of the term "Excise" makes it refer only to a tax on commodities or on particular occupations, which this tax certainly is not.

But we do not see any good end to be attained by such a showing. Our faith is strong, as before indicated, that it will not be by names legislatively given, but by things legislatively done, that this

court will be governed in the disposition of these cases.

If Congress did not attempt to levy a direct income tax, it did attempt to levy an indirect privilege, license or franchise tax. By whatever name it may be called it falls within the class of indirect taxes which the Constitutional Convention in its finished work, lumped together as "duties, imposts, and excises."

We do not think it is necessary or useful in view of the language of the majority opinion of the court at the first hearing of the *Pollock* cases, 157 U. S., at page 557, and never withdrawn, to enter upon any discussion of whether there can be any tax levied by Congress which is not a direct tax nor included under the words "duties, imposts and excises."

The Chief Justice in that opinion, said:

"Thus in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

"The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of Section eight to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

"And this view was expressed by Mr. Chief



Justice Chase in *The License Tax Cases*, 5 Wallace, 462-471, when he said: 'It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited and thus only it reaches every subject and may be exercised at discretion.'

"And although there may have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We may then in this branch of the argument build on the foundation that if the tax in question be not "a direct tax," it falls, if not within the strict definition of an "excise," yet within the terms generically used by the Constitution makers, "duties, imposts and excises," and is subject to the rule of uniformity.

But the essential question which then meets us again is not What is the proper name of this tax—which must be "uniform"—but On what is it levied? or For what is it to be paid?

Answers to these questions are necessary before we can properly discuss the question lying beyond: Has the rule of uniformity been followed in its imposition? And the one still farther on: If the rule

of uniformity has been thus observed, is the tax invalid because levied on and exacted for something which causes it to infringe on the rights reserved to the States under the Federal Constitution?

The questions "On what is it levied?" or "For what is it to be paid?" are, however, really identical on that hypothesis on which we are proceeding which eliminates the conception difficult to banish from the mind—that as this tax is directly proportioned to the income of the persons taxed it falls on that income.

But if we are to succeed in thus banishing this conception, we must do it by first, with whatever effort is necessary, accepting the proposition of the Government, as it has always been that of all the advocates and defenders of the tax, that the net income of the respective parties taxed has nothing to do with the matter, except as a *measure* for the amount of a discriminating *license or franchise* tax to be placed on them.

This was the position, it may be noted, taken in the ablest though not the longest arguments made in favor of the validity of the law in the Senate of the United States. Senator Daniel baldly stated the theory which we have indicated,—the only other theory which can be invoked with plausibility even, to withdraw this tax from the category of direct in-

come taxes. In opposing the practical exemption of holding corporations, which by the provision concerning deductions finally secured a place in the bill, he said, "An impression \* \* \* that it is taxing property twice if a corporation holds stock in another corporation if both corporations are taxed with respect to the holding of such property \* \* \* is a complete confusion of thought. If a holding corporation owns bonds or stocks, it does not by this proposition pay any tax on them at all as bonds or stocks. They are simply used as a yardstick by which the measure of the excise, which is in the nature of a license tax, shall fix the number of dollars for that license or privilege." Senator Root said: "It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility which is taxed."

It does not, we will admit, look very logical that Congress should nevertheless have allowed the deduction of the income from all corporation stocks owned by a holding company, from the "yardstick measure," but we must remember not only that logic is not always a distinguishing mark of legislative bodies, but also that we are now excluding only by hypothesis, the view that Congress, despite the theory of the framers and chief advocates of the law that phraseology could hide substance, intended to

pass another direct income tax law to enable this court to reconsider its conclusions in the *Pollock* cases.

Much more logical viewed in the light of its own theory is the ruling of the Department of Justice, despite its apparent injustice in effect, that the various issues of the bonds of the United States exempted from taxation by the laws which issued them, must yet be computed as within the sources of that income which is to be the "yardstick," with which to measure the "license," "franchise" or "excise" tax which the Corporation Tax is alleged to be.

But still, when the idea that the income, of which an aliquot percentage is to be taken in the license tax, is a mere measure is fully assimilated, the question recurs: For what privilege is this license tax to be taken?

As we are eliminating by hypothesis the possibility of this tax being one on property or income we must eliminate also the idea that it is a tax on the privilege of holding property. Certainly no one would attempt to make a distinction in nature between a tax on property and a tax on the privilege of holding property, or a distinction between a tax on income and a tax on the privilege of receiving income. To do so would be to contend that to make an

unapportioned Federal tax on real estate, on invested personal property or on municipal bonds valid, it is only necessary for Congress so to change the phraseology as to declare it a tax on the privilege of owning real estate, of owning invested personal property or of owning municipal bonds. This would be a *reductio ad absurdum*, not necessary to comment on.

In view then of the hypothesis eliminated, there are but two answers to the question, "For what privilege is this license tax to be taken?" possible to formulate. One is that it is for the privilege of doing business, not any special or particular kind of business, but any business whatever. This of course implies further that selected apparently arbitrarily from all other persons and bodies whatever, corporations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies, shall alone be required to pay a license tax for the privilege of doing business, while all other persons and associations may do the same business without such an imposition.

The other possible answer is that this license tax is to be paid in the case of a corporation for the privilege of being a corporation and in the case of any of the other associations or companies men-

tioned in the law for the privilege of being such an association or company.

We are not advised to which alternative the Government will commit itself. To one it certainly must.

On which one it is desirable to base an argument for the validity of the tax the Department of Justice has undoubtedly decided, but no such decision was reached by the proponents or advocates of the bill before it passed. It is a matter of common knowledge that the law as recommended by executive message was to be "a tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock." But the law as passed was not the law recommended and as to whether the tax under the law that was passed would fall on and be paid for the privilege of *doing business* as a corporation, joint stock company, association having shares of capital stock or insurance company, or on the privilege of *existing* as a corporation, company or association, its advocates seemed hopelessly at sea.

We think it really makes little difference in the last analysis, and particularly as bearing on the objection of the want of uniformity which we are now considering, which answer may be adopted. So far

as corporations are concerned, like the defendant corporation, the answer must be either that it is a tax on, and paid for, the privilege of doing business as a corporation, or a tax on, and paid for, the privilege of existing as a corporation; and in either case we shall contend it is obnoxious to the objection of want of constitutional uniformity expressly required, and to the wider one charged in our bill, of want of the uniformity "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

But it appears to us clear that the first answer which would describe the tax as a tax on the privilege "of doing business" is absolutely inadmissible for the reasons which we urged heretofore in another branch of our argument. It is not proportioned to the amount of business done, nor to the amount of income received from such business, and, more conclusive still against the description, the tax is not in the case of domestic corporations dependent on the doing of any business nor on the ability to do any business. The mere use of the phraseology, "with respect to the carrying on or doing business," cannot overcome considerations like these.

It is, therefore, on the privilege of *being* a corporation that the tax is laid, if it be a privilege or license tax.

It may be said—indeed, it has been said (Machen on Corporation Tax)—that the tax cannot be on the privilege of existing as a corporation, because it is applicable not only to corporations but to various unincorporated bodies.

The obvious answer to this is, that if it is a privilege tax at all, it is a privilege or license tax laid on different privileges. So far as corporations are concerned, it is laid on the privilege of being a corporation, and undoubtedly it was principally for the purpose of affecting corporations that the law was passed. But Congress added to that privilege to be taxed, the privilege of being a joint stock company organized for profit and having a capital stock represented by shares, the privilege of being an association organized for profit and having a capital stock represented by shares, and the privilege of being an insurance company. It is true that this was a somewhat heterogeneous collection, but we have before noted that the logical working out of the original idea of the tax seems to have been defective. It does not prevent the tax on a corporation from being a tax on the privilege of being a corporation, because the tax on a joint stock company



is a tax on the privilege of being a joint stock company. Indeed, as we shall hereafter point out more in detail, the privilege of being a joint stock company of the kind described in the law does not in some states differ more from the privilege of being a corporation than the privilege of being a corporation in one state differs from the privilege of being a corporation in another.

We shall assume, therefore, in the mere phrasing of our further argument, that the only plausible alternative to the holding that the Corporation Tax is a direct income tax on certain selected persons, is that in the case of a corporation it is "a privilege or license tax" on the right to be a corporation. We do this because it seems to us true, not from the necessity of the argument, for all that we shall suggest will apply, in substance, as well, if the tax is on the privilege of doing business as a corporation, as though it were on the privilege of existing as a corporation. Indeed, does not the franchise or charter granted by a state to exist as a corporation imply a right to do business?

## VII.

Consider, then, first, on whom this privilege tax principally falls:

Corporations like the one involved in this case are creatures of the state under whose laws they are incorporated. They are artificial persons regulated

within that state, it is true, by the laws of the state which created them and which may impose such conditions on their existence as it pleases. So, too, may other states impose conditions on the exercise of their functions—practically on their existence—in such states. But to the Federal Government they are in the same relation as natural persons having the same rights of citizenship in the creating state. The United States has no regulatory or visitatorial powers over them which it does not have over all persons in its jurisdiction. And the same thing is true of insurance companies and joint stock or other associations of the nature described in the law.

Were authorities necessary for this proposition we could cite them in scores from the decisions of this court. We content ourselves with mentioning only:

*Louisville C. & C. R. Co. v. Letson*, 2 Howard, 497.

*Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

*Ohio & M. R. Co. v. Wheeler*, 1 Black, 286.

*Bank of Augusta v. Earle*, 13 Peters, 519.

*St. Louis v. Wiggins Ferry Co.*, 11 Wallace, 423.

*San Bernardino County v. Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

*Pembina C. L. M. & M. Co. v. Pennsylvania*, 125 U. S., 181.

*C. C. & A. R. Co. v. Mackey*, 142 U. S., 386.

Unless, then, the defenders of this tax are, as has been well said, prepared to go to the extent of asserting that Congress can levy at its discretion a tax upon all red headed men, or all blue eyed men, or both, under the guise of a privilege or license tax for being thus red headed or blue eyed; or, at the very, least, can levy a tax on the privilege of such red headed or blue eyed men to do business in the United States, while leaving untouched by such taxation all other men doing the same business, this law must fail on their own theory.

And so some at least of its advocates have conceded and boldly avowed their belief in the hypothetical proposition. They have done this, acknowledging that such a tax would not be uniform between citizens throughout the United States nor between persons in the same states; admitting, too, that it would be an arbitrary classification of persons to be taxed, not justified ethically, as they contend this Corporation Tax is, but nevertheless constitutional and beyond the power of this court to interfere with or to declare invalid. The ground of this contention is that the unconstitutionality of a tax can not be declared unless it is shown that it infringes on the express words of the Constitution limiting the otherwise uncontrolled right of Congress to tax.

The uniformity required in the levying of indirect

taxes, they say, is a geographical, not an inherent, uniformity and means only that the tax must be operative in all the states alike.

We shall briefly allude to this question of the nature of the expressly required uniformity in another connection, but for the purposes of the argument at this point, we admit that such has been the decision of this court as to the meaning of the express limitation of uniformity "throughout the United States" imposed upon indirect taxes by the Constitution.

But we are unprepared to admit the further necessary premise of the argument of the defenders of the tax that the unconstitutionality of a tax must absolutely be found in the express words of the Constitution.

We have alleged in our bill, as before noted, a conclusion of law that uniformity is, if not expressly, yet "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax,"<sup>2</sup> and for that proposition we strenuously contend. On it we are certainly not foreclosed by any utterance of this court, which, in the case most strongly insisted on as establishing forever and beyond all controversy that

the express uniformity required by the Constitution is only a geographical one (*Knowlton v. Moore*, 178 U. S., 41), said:

"It may be doubted by some, aside from express constitutional restrictions whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, *would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.* On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since as we understand the law, we are clearly of the opinion that it does not sustain the construction which was placed on it by the court below."

Again:

"If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."

We contend that the time spoken of by Mr. Justice White has now come; that the tax under discussion is "arbitrary and confiscatory," and that in-

herent and fundamental principles for the protection of the individual should be applied.

It is not the exercise of an allowed legislative discretion raising merely a question of abstract justice and expediency that selects from some millions of persons engaged in myriads of differing mercantile, manufacturing, agricultural, fishing, mining, financial and other industries, several hundred thousand only, whether because of their blue eyes or red hair or because they are in the purview of the state which created them alone, artificial rather than natural persons, and subjects them to a privilege or license tax either for the right of existing or for the right of carrying on their various and varied occupations.

It is so much a matter of common knowledge that it is not out of place in this argument to allude to it, that there are 400,000 corporations in this country and that not one per cent, with the exception of the railroads, are doing a business more public with reference to the interests of the United States than the millions of men in and out of partnerships, engaged in the purely private business activities of the country. The trade or business that the majority of these corporations carry on reaches down to the local mercantile business of small cities and towns where they are competing perhaps with

powerful individual or partnership rivals, at whose mercy these corporations who have themselves no counter-balancing advantages against such rivals, will be by the operation of this law placed, if it should be held valid.

We do not urge these considerations with any reserved thought that they can affect the judges of this court if it is to be held that they are matters merely of expediency and exact justice, to be therefore properly addressed to Congress alone; but because we believe them to be proof of such gross discrimination and arbitrary exercise of power in taxations as in the striking language of Mr. Justice White for this court, "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We shall not press the argument on this point further. It is of a nature that will appeal to this court at once and spontaneously or not at all. If we are wrong in our conception of the power of this court or of the exceptionally arbitrary discriminations of this tax, the court will not be moved by our insistence; if we are right, the court will recognize it and prevent by the exercise of its highest prerogative and duty a great injustice to the citizens who have associated themselves together in corporations and joint stock companies.

## VIII.

We come now to the express uniformity "throughout the United States" required by the Constitution in duties, imposts and excises.

In our bill (of which there is an abstract in the statement prefixed to this argument), we have in Paragraph Fifteen under alphabetical arrangement set forth certain particulars as we conceive them, in which this tax does not conform to the rule of uniformity. As to those which are listed under subparagraphs A, B, C, D, E, F and H, we will concede that they lose much of that part of their force which rests upon the *express* uniformity required by Section 8 of Article 1, of the Constitution, if that uniformity is not an inherent but a mere geographical uniformity. That it is a mere geographical uniformity we must also concede was held in *Knowlton v. Moore*, *supra*, and in *Patton v. Brady*, 184 U. S., 608.

On that proposition therefore we shall only presume to say that in the *Pollock* cases, in which the tax under discussion bears much more resemblance to the Corporation Tax than those discussed in *Knowlton v. Moore* and *Patton v. Brady*, four members of this court, as shown by the opinion on the first hearing, held that the tax violated the uniformity required, and Mr. Justice Field's concurring



opinion declared that "the correct meaning of the provisions requiring duties, imposts and excises to be uniform throughout the United States" is that the law imposing them should have an equal and uniform application in every part of the Union, and that "if there were any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt should be resolved in the interest of justice in favor of the taxpayers."

And because of the exemptions which were little different in principle in the Income Tax Law of 1894 from those provided for in the Corporation Tax Law of 1909, he announced his conclusion that the part of the Income Tax Law which levied duties, imposts and excises was void in not providing for the uniformity required by the Constitution in such cases. As we have said three other justices of the eight then sitting agreed with him in that conclusion and in consequence the precise question (which became an academic one in the subsequent hearing of the case) was not decided at either hearing.

But in each of the sub-paragraphs of our bill referred to are allegations concerning the provisions of the law which no holding of this court has deprived of whatever force they may have to the minds

of its members in connection with the considerations we have already urged against the power of Congress under the *implicit* requirements of our Constitution and system of government, to make arbitrary, unreasonable and grossly discriminating classifications in the levying of taxes.

But farther:—on the strictest construction of the constitutional limitation to uniformity in *excise* and other indirect taxes we contend that we have pointed out in sub-paragraph G of Section 15 of our bill matters which show that this Corporation Tax does not conform to it. The tax is no more uniform geographically between the states than inherently between individuals, partnerships and corporations within the respective states.

The tax, so far as a corporation is affected, is one on the right or privilege of existing as a corporation; so far as a joint stock company is concerned, of existing as a joint stock company; so far as an insurance company is concerned, of existing as an insurance company;—or at the very best that can be said of it on the right or privilege to do business as a corporation, a joint stock company or an insurance company respectively.

But the right or privilege of existing as a corporation or as a joint stock company or as an in-

surance company and the right or privilege of doing business as any one of them, differs widely in its nature among the different states. These rights and privileges are very different things in New Jersey, for example, from what they are in California.

For illustration: In the executive message which first proposed a corporation tax to the Senate and in much of the discussion in that body it was assumed that the privilege of existing or doing business as an artificial entity included a right of freedom from individual liability by those who owned stock. So it does in New Jersey for example in the case of most corporations at least. But no such freedom from liability is connected with the right or privilege of being or doing business as a corporation in California, where by the constitution of the state, each stockholder of a corporation is made individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. (Constitution of California, Article XII, Sec. 3.) It is not only alleged in our bill—it is within the judicial knowledge of the court (for the Supreme Court on appeals from the federal court takes judicial notice of the laws of all the states—(*Hanley*

*v. Donoghue*, 116 U. S., 1; *New York Fourth National Bank v. Francklyn*, 120 U. S., 747; *Case v. Kelly*, 133 U. S., 21; *Mills v. Green*, 159 U. S., 651), that the rights duties and privileges and obligations of corporate existence differ so widely in different states that this Corporation Tax is the taxation in different states of entirely different things by accident more than design having the same name. The word "Corporation" has no more the same meaning in California that it has in New Jersey than it has in England, where it is understood to mean a municipal governing body.

What is this but a want of geographical uniformity? Words can hardly make it plainer.

The same propositions are emphatically true of insurance companies and of joint stock companies in the various states. They are created, supervised and regulated by and under entirely different laws in different states. The right or privilege therefore of being a joint stock company and the right or privilege to do business as a joint stock company is an entirely different right or privilege in one state from that which it is in another.

In some states joint stock companies are not, we think, provided for by statute at all. In such states, what is a joint stock company? In the federal law

the term certainly has no specific meaning. Is there a common law definition of it? If so, it is, in those states, the right or privilege of being such a joint stock company as has a common law organization that has to be paid for by this tax. But in other states it is, by statute, necessary to the legal existence of a joint stock company that certain documents be filed in a public office. Failure to file them leaves the company a mere partnership. In other states the same form of organization constitutes a joint stock company without any filing of papers. Thus, identical organizations would constitute in one state joint stock companies subject to the tax and in another state mere partnerships not taxed. Again, where is the geographical uniformity? It is violated in as plain and obvious a manner as the framers of the Constitution could ever have feared it might be when establishing the limitation.

It will not do to say that such organizations as by the force of statute law are left partnerships because of failure to comply with filing requirements, will fall within the description of "associations organized for profit and having a capital stock represented by shares," for the "shares" will be shares in a partnership in no wise differing from these duplicate originals of a partnership agreement which define

and specify the respective interests of the partners in the common fund or capital of the partnership, and we have not heard any claim and do not believe that such a one will be made that the intent of Congress covers partnerships, although the law does not expressly qualify the term "shares" with a limitation that they must be transferable.

And to illustrate the general obscurity of the law, we may ask what sort of an "association" or combination of people "organized for profit and having a capital stock" can there be which is not a corporation, a joint stock company or a partnership?

The laws which regulate the business and duties and rights and very existence of insurance companies, of banks and trust companies (like the Northern Trust Company), and of their stockholders, vary so much in the different states that it would take a volume to enumerate the differences. Does the tax on the right or privilege of being an insurance company, or bank, or trust company, or of doing business as an insurance company, bank, or trust company, fall on the *same* right or privilege in these different states? Is there uniformity in such a tax "throughout the United States," even if we give those words the strictest geographical meaning? These questions admit to our minds only of a nega-

tive answer. If that be the true answer, this tax must fall, even if it be truly an "excise" tax and "indirect."

Before we leave this subject of geographical uniformity we wish to allude to some alleged significant decisions of this tribunal which have not been officially reported and the statement of which, therefore, as made by an eminent Senator and constitutional lawyer, we have had no means of verifying prior to the printing of this argument. We use the matter, therefore, in no sense as authority, but only as illustration.

The Senator had made the extreme declaration to which we have before alluded and which we dispute, that Congress could validly tax all red headed men engaged in a given line of business, if the tax fell upon every red headed man in Massachusetts as well as in Mississippi and in Texas and in all other states.

He was asked:

"Can the general Government tax the cotton of the south and leave the wheat of the western farmer untaxed?"

To which he replied:

"Congress did once levy a cotton tax and it was attacked in the courts. The trial Judge held the law constitutional and the case was appealed to the Supreme Court of the United States which then consisted, I believe, of only eight members, there being a vacancy, as I re-

call, in the Chief Justiceship. The question was argued and re-argued and probably argued a third time in that tribunal. The judgment below was affirmed without any opinion by a divided court, four of the Judges holding the law unconstitutional and four holding it constitutional. The four who held it unconstitutional did so, as I have always understood, upon the ground that the court must know judicially that cotton could not be grown in all the states and therefore that the tax on it could not be uniform. I have always regretted that the opinions in that case have never been published. The Senator's inquiry suggests a very pertinent consideration. *I do not myself believe that Congress has the power to levy a tax which the court can judicially know is incapable of uniform operation.* I do not hesitate to say that if that cotton tax had been levied at any time except in a period of great exasperation and sectional prejudice the court would have unanimously held it void. I must not forget to pay Congress the compliment to say that after the argument of that case, Congress had the good sense to repeal the Cotton Tax Law. That is the reason it was never finally and judicially tried out to a conclusion."

We agree with the learned and distinguished lawyer, whose words these are, that Congress has no power to levy a tax which this court can judicially know is incapable of uniform application. Such a tax is the one under discussion. The court not only can, but must, judicially know, if this tax be an excise tax on privileges or rights, that inasmuch as it falls on rights and privileges radically and inherently different in the different states, it is incapable of even geographically uniform application.



## IX.

We pass now to another branch of our argument.

It is upon the objection to the tax specifically set forth in the sixteenth paragraph of our bill that if it be an excise tax—a franchise privilege tax—whether or not it be held uniform throughout the United States within the meaning and intent of the Constitution, it is in conflict with the Constitution of the United States because the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of such franchises and privileges which the states have full power to grant,—and because the tax is, both generally in its effect upon all the states and particularly in its effect on the defendant corporation and others like it, an attempted unconstitutional interference with instrumentalities of the states.

This objection to the law is one which we should deem, even in the absence of all others, controlling and decisive, and it is from no want of a sense of its importance and weight that we shall content ourselves here with a very concise and unelaborated

argument to sustain it in its widest and most fundamental aspect. But we know that it will receive from other counsel before the court the comprehensive and detailed discussion which it deserves, and we do not desire to duplicate and repeat unnecessarily matters which are thus sure to be fully and exhaustively treated by others.

The objection reduced to its lowest terms may be said to be this:

The power to tax involves the power to destroy, as the often repeated utterance of Chief Justice Marshall in *McCulloch v. Maryland* asserted. The power of creating corporations is a reserved right of the states. It is practically unlimited in the states. As this court said in *Briscoe v. The Bank of Kentucky*, 11 Peters, 257, p. 317:

“A state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty.”

But if Congress, by taxing, can destroy the right or privilege of being a corporation, it infringes on the power of the state to create corporations.

And here, for the first time in our argument, we think that the question we have before discussed, whether this Corporation Tax is placed on the privilege of being or existing as a corporation or on

the privilege of doing business as a corporation, becomes, although not vital, of some importance.

For it has been urged by others and may be urged by the Attorney General here that a doubt might exist whether a federal tax could be laid upon the charter of a corporation granted by a state, which tax must be paid *before* that corporation could go into existence, but that such doubt does not exist about the tax under discussion because it is a tax levied upon the *business* of such a corporation *after* it goes into operation and is to be collected under penalty, and not by the forfeiture of its charter.

In view of the consideration that if the tax is placed on the privilege of doing any business as a corporation, it is placed on the privilege which is in the last analysis all that the charter is granted for and means, the distinction seems to us to be too fine to be vital even in this phase of the argument; but even more clearly does the fact that the tax is not made a condition precedent to the mere granting of the charter or incorporation right appear immaterial, if this tax is one not on the privilege or right of *doing business* as a corporation, but upon the very right or privilege of *being* a corporation. That this is the true nature of the tax, considerations which we have hereinbefore mentioned force us to believe. And this view is further strength-

ened by the fact that those attributes of corporations which it is claimed render them, rather than natural persons, proper objects of this discriminating tax, privileges which it is said should be paid for, namely, persistence in existence and exemption of stockholders from individual liability (which latter privilege, however, as we have before remarked, does not always exist) are inherent characteristics of the franchises granted by the state, elements in the very existence of the corporations, and no part of the business which they conduct.

If the tax is thus on the very existence of a corporation and the right to tax involves the right to destroy, it can make no difference as to its constitutionality whether it is placed on the right of the state to grant the franchise or on the franchise when granted, nor whether its payment is a "condition precedent" or a "condition subsequent."

We are well aware that an argument from the famous and somewhat epigrammatic utterance of Chief Justice Marshall, which has been quoted, may easily be pressed too far. The force of the reasoning on this point of Mr. Justice White in his opinion in *Knoulton v. Moore* (*supra*), and of other members of the court in the cases that he therein cites, can be denied by no reasonable man. "If a lawful tax can be defeated," he says, "because the power which

is manifested by its imposition, may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied. Under our constitutional system both the national and the state governments moving in their respective orbits have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

And so, applying this thesis to a tax *not* "on the right to regulate the devolution of property on death," but "on the transmission or receipt" to and by the heir or devisee, the opinion rejects the argument against such a tax that "wherever a right is subject to exclusive regulation by either the Government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate," declaring rightly that such an argument might be applied to the right to receive conveyances, mortgages, leases, pledges and indeed to the right to all property and the contracts which arise from its ownership (since they, too, are subject to state regulation exclusive in its na-

ture), as well as to the right to inherit, or receive by legacy, and thus the authority of the National Government to tax almost every subject of direct and many acknowledged objects of indirect taxation would be excluded.

And in accordance with the analogous doctrine that the power residing in a state to regulate (or, indeed, prohibit) a given business, does not make unconstitutional an act of Congress imposing a tax on carrying it on, the License Tax cases (Wallace, 462), were decided.

But neither *Knowlton v. Moore* nor the License Tax cases nor the kindred cases cited in the opinion in *Knowlton v. Moore*, are like the cases at bar. It is not the taxation of some business or property right which the states have the power to regulate and control that is objected to in this case. It is, on the other hand, a tax on the very right or privilege of existing at all, a very different thing. Such a tax on the privilege or right of existing is tantamount, it seems to us, to a tax on the right to create such an existence, and to fall within the other language of the opinion in *Knowlton v. Moore*, which declares that:

*“The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may*

*be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of taxing authority as to a subject which is beyond its scope."*

We can not formulate to ourselves a more apt statement to apply to the Corporation Tax. Except for its requirement of publicity in the returns (which the court might not find so involved in the general intent and scheme of the law that it could not be adjudged unconstitutional without overthrowing the entire tax), the burdens of this particular tax law might not be considered intolerable, but it *is* intolerable to any believer in the reserved rights of the states that a power to destroy the privilege of existing as a legal entity granted by a state in the exercise of an exclusive right to do so, should reside in Congress.

Not such was the holding in the cases before referred to, cited in the opinion in *Knowlton v. Moore*.

The case of *Veazie Bank v. Fenno*, 8 Wallace, 533, may be considered the nearest in point to the contrary contention. But in that case it was plainly the exercise of one business only, which was allowed to the bank by the franchise creating it—that of circulating notes to pass as money—on which the tax fell, and that one a business which was a function in itself allowed the Federal Government.

This particular right or privilege, therefore, as has been well pointed elsewhere by one of the counsel in one of the cases now before the court, was subordinate to powers expressly conferred on Congress to provide a currency for the whole country by appropriate legislation. Under these circumstances it was more significant that two Justices dissented from the judgment affirming the validity of the tax on the ground that it affected the power of the state to create corporations, than that the Chief Justice, in voicing for the majority of the court the reasons for their decision, should have added to the sufficient ground of the powers of Congress over the currency, and to the statement that the tax was one not on any franchise of the bank but on property created or contracts made by the bank, a further statement that it could not "be admitted that franchises granted by a state are necessarily exempt from taxation, for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserve power of a state, seem to be as properly objects of taxation as any other property."

Aside from the fact that this is a dictum only of the Chief Justice, it bears no such construction as the Government may be tempted to put upon it. That by "franchises," Chief Justice Chase meant



and meant only, particular and specific "franchises" or branches of private business allowed by state law to state created corporations, is shown not only by the whole tenor of the opinion, but by the fact that in the argument for the Government, it was only claimed that the tax was "an excise or duty on a branch of business" and that the power to tax included the power "to make taxation burdensome or even destructive to particular branches of business"—a proposition which we certainly do not dispute.

Our case falls rather within the general language of Mr. Justice Bradley speaking indeed of the attempt of a state to tax franchises granted by the United States:

"The power conferred emanates from and is a portion of the power of the Government that confers it. To tax it is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty."

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

For he further said in the same case:

"No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise*";

and this court has also said and repeated:—

*Collector v. Day*, 11 Wallace, 113;

*Van Brocklin v. Tennessee*, 117 U. S., at page 178; and

*Pollock v. Trust Co.*, 157 U. S., at page 584:

“The general Government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but the states within the limits of their powers not granted or in the language of the tenth amendment, ‘reserved,’ are as independent of the general Government as that Government within its sphere is independent of the states.”

But whatever may be said or thought of the right of Congress to tax a franchise or the privilege under a franchise granted by a state, either to exist or to do business, and whatever may be the extent of that right of Congress or its limitations—on one thing there is not and never has been doubt or difference. Congress can no more tax the public instrumentalities of the state than can the states tax such instrumentalities of the federal government.

This court said in *Ambrosini v. The United States*, 187 U. S., 1, that the law of self-preservation exempts any and all means and instrumentalities of state government from federal taxation.

The same doctrine explicitly declared—sometimes applied to attempts of the states to tax the instrumentalities of the federal government and sometimes to attempts of the federal government to tax the instrumentalities of the states—runs through the decisions of so many cases that to attempt to

make a catena of them is useless. It is the settled and recognized law of the land. A few of such cases may be cited:

*McCullough v. Maryland*, 4 Wheaton, 316.

*Collector v. Day*, 11 Wallace, 113.

*United States v. Baltimore and Ohio Railroad Co.*, 17 Wallace, 322.

*Railroad Company v. Peniston*, 18 Wallace, 5.

*California v. Central Pacific R. R. Co.*, 127 U. S., 1.

*Ambrosini v. United States*, 187 U. S., 1.

The Corporation Tax, as attested by all the arguments of its advocates; by the common knowledge that without the inclusion of the corporations which furnish transportation, water, light, intelligence-transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant; and by the internal evidence of its provisions for publicity which in the case of merely private business enterprises can find no plausible pretext of justification; was perhaps framed more for the purpose of falling on public service corporations than on any others.

The inclusion of these corporations within the operation of the law is (as we have said is also the case as to the income of corporations from real

estate and invested personalty) part of the warp and woof of the law, "constituting one entire scheme of taxation." If these corporations cannot be constitutionally taxed under it therefore, we submit the "entire scheme" must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases, and referred to in the first branch of this argument.

And what are these public service corporations but instrumentalities of the state?

They certainly are not the recipients of mere private privileges either of existing or doing business, and yet it is on the assumption that such is the character of the privileges granted to corporations by the state that the argument for the right of Congress to tax them rests. It is not necessary to advance any debatable theories or to discuss the propriety or advisability of a more specific and complete public ownership of these public utilities to negative the idea that when they exist in private hands, as the great majority of them do today, they are not nevertheless so far impressed with a public character and function that both by its grants to them and its demands from them the state creating them has made them and treats them as its agencies and instrumentalities to perform public services.

The most ardent individualist does not now deny that to them are given a part of the power of the state,—some of the attributes of its sovereignty which it can control at all times and can in many cases and under certain contingencies recall. That the function of a water company supplying water to a village community is a governmental function was distinctly asserted for example (and the example is only one of scores that could be cited) in *Rogers Park Water Company v. Fergus*, 180 U. S., 624. In the similar cases decided at the same time of *Freeport Water Company v. Freeport City*, 180 U. S., 587, and *Danville Water Company v. Danville City*, 180 U. S., 619, it was admitted by both majority and minority opinions in a discussion of the question unnecessary to go into here of the right of a municipality to make an irrevocable alienation of such a governmental function, that for Illinois at least the Supreme Court of that state seemed to have adopted a theory which if followed would prohibit such an alienation. We allude to these cases only to show how undisputed is the doctrine that these public service corporations are exercising, under grant of the state, governmental functions of the state.

But certainly no citation of authority is really necessary for this. Multitudes of these corporations, including practically all the intra-state as well as

inter-state traction or railroad companies, are given some right of condemnation under the doctrine of eminent domain. He certainly would be a bold man who would deny that that power was a grant of governmental function to an agent or instrumentality of the state. Under the principle of eminent domain every man holds his property subject to the supreme right of the sovereign to take it. But it is the right of the sovereign and of no one else. The state is the sovereign in our system by which this very highest power of government is often used to take from a man his homestead or his farm without his consent. But the state uses in doing it its instrumentalities and agencies which, in the form of public service corporations, exercise the power of condemnation given them, leaving to the courts in effect only the determination of the compensation. The right of the party whose property is taken for public use to compensation is an express constitutional one, and not a part of the common law doctrine of eminent domain. It is not the courts, it is the state through the corporation to which it has granted the power "to take private property for public use without the owner's consent," that exercises this sovereign power of eminent domain. Are not then the corporations that exercise it instrumentalities and agencies of the

state in the strictest and most precise meaning of those words?

We submit that federal tax can neither be laid on the right of such corporations to exist nor on their right to do a public business. Truly in such a case the power to tax *is* the power to destroy the means which the sovereign state in the plenitude of its power has deemed the best instrumentalities through which to supply to its citizens the very necessities of life—water, light, transportation and information. The words of this court in *Veazie Bank v. Fenno* come back to us naturally for repetition:

*“The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope.”*

But if the “license or privilege” tax—that this Corporation Tax is claimed to be—cannot be validly placed on these public service corporations, we submit that it cannot be placed on any, for the inclusion by the law of public service corporations is an evident part of the intent under which the law was passed as “an entire scheme of taxation.”

## X.

Even were the law not to fail as a whole because of its inclusion of public service corporations as we strenuously insist that it must, yet the tax would lack validity against the defendant corporation in the particular case which we are arguing and against all similar corporations, made by the law of the state creating them public agencies and instrumentalities of the state in a form analogous to, although differing from, that which is the characteristic of public service corporations.

Our bill alleges that the Northern Trust Company, the principal defendant, has, among other powers granted to it by the State of Illinois,

1. That of receiving an appointment by any court of competent jurisdiction in the State of Illinois as trustee, receiver, assignee, guardian, conservator or administrator.

2. That of so becoming under order of court the depository of funds held by such officers as to discharge those officers from further care or responsibility for said funds.

3. That of so becoming such a depository with the effect of reducing or dispensing with the public bonds of said officers.

The bill also alleges that because of these semi-public functions which it is authorized to perform



the Northern Trust Company is held to very strict reports to and relations with the State of Illinois, and has been obliged to deposit with an officer of the state government \$200,000 in bonds of the United States or other approved securities.

The bill also alleges that the defendant, the Northern Trust Company, as a matter of fact has, under its charter authority and by the provisions of state legislation been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars; and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignees and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees, with the said defendant corporation.

It is an agency through which to adopt language from *U. S. v. Baltimore & Ohio R. R. Co. (supra)*,

“The legislative, executive and judicial de-

partments of the state administer their own affairs in their own manner.

“This carries with it an exemption of these agencies and instruments from the taxing power of the federal government. If they may be taxed lightly they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted.”

We submit without further argument that the allegations of fact above recited justify the further allegation of law made in paragraph seventeen of our bill that in the case of the Northern Trust Company, “in a peculiar and especial sense, the Corporation Tax is an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers.”

Moreover, the allegations of the bill show that the Northern Trust Company “owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states,” and that it derives an income of more than \$50,000 annually from these bonds.

On such bonds or on their income an undivided court in the *Pollock* cases (see Mr. Justice White's dissenting opinion at the first hearing, 157 U. S., 652), held that no federal tax *direct or indirect for any purpose whatever* can be imposed, because these bonds are the agencies and instrumentalities of the state governments. Nothing can be plainer than this holding or than the doctrine of the cases cited in the opinion of the court to sustain it. It seems to us that in substance and essence they apply whether the income be considered the thing taxed or the measure by which the tax is gauged.

Yet, as the bill alleges, the defendants intend, despite the protest of the complainant, to pay as this Corporation Tax, one per cent of the net income of the Company, including its income from municipal bonds.

That an injunction should have been granted by the Circuit Court against its doing so, we submit with confidence.

And with this proposition we purpose to close this argument, leaving to the court without further discussion from us the allegations of our bill in Paragraphs 19, 20 and 21, which call in question the retrospective nature of the tax as to income accruing before August 5, 1909, and the much criticized and

bitterly unjust provisions of the law which absolutely require publicity in matters which affect no public interest and subject to the discretion of the executive the divulging of more intimate and detailed information still—when such information has been obtained by inquisitorial and summary processes. These elements of the law, however inexpedient and ill-advised, might by themselves perhaps be upheld as within the discretion of Congress as means of enforcing the tax, if in its essential substance it should be held valid or they might be overthrown without involving what we have designated as the warp and woof of the statute. We do not doubt however that they will receive full attention in these aspects from other counsel before the court. We have endeavored only to make plain our reasons based on fundamental principles for believing the entire enactment invalid and void, and we leave our contentions in the hands of the court, knowing that whatever its duty may seem to its members to be, it will be wisely and courageously done.

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